THE LAW

OF

LIMITED PARTNERSHIP.

BY

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PREFACE.

The American system of Limited Partnerships, adopted in Upper Canada and in all the organized subdivisions of the United States except the three Territories of Arizona, Idaho, and New Mexico, is unknown in the rest of the world.

The idea of a limited partnership arose several centuries ago (see §§ 3, 4) in Italy, and thence spread to the Netherlands, Spain, and France, where, viewed with eyes of lenient construction by courts and commentators, it grew to luxuriant proportions, only partially trimmed by the repeal of § 38 of the Code de Commerce in 1856. The French statute without the French construction was grafted upon our jurisprudence in 1824; but the process of integrating it with the common law choked the exotic outgrowth in the germ and produced a native system bearing no resemblance to the parent, yet which, though arising under the statutes of forty-five different States, forms a consistent and homogeneous system, as does the system of Code Pleading, with almost none of the chromatic aberrations that might have been expected from the media of so many atmospheres. For the European law I recommend any one to read Troubat on "Limited Partnership," published in 1853, rather than to go to

his foreign originals, most of which are out of print; and the latest French law (§ 8), adopted after over ten years of legislative discussion, is analogous to our law of corporations. Hence, except as a study in comparative jurisprudence, the foreign law is of no interest to us, and to restate it here would be merely to act the part of Old Mortality,— renewing forgotten graves.

Many of the principles of general partnership law apply to limited partnership. These I have avoided stating, except where necessary to construe doctrines of limited partnership or explain or limit decisions; and where thus compelled to resort to the general law, I have neither followed nor cited any existing text-book.

I have read and made notes of about five thousand American cases on partnership, which comprise nearly, but not quite, all there are. My object was twofold,— First, a belief that in this, as in many departments, the cases contained much law which had never been brought to light, and that new and useful examples of reasoning and precedent awaited whoever would go to the trouble of finding them. In this I have not been disappointed. Second, a hope — still distant — of producing an ideal treatise, constructed, by the use of different sizes of type, so as to combine at once a small and general work of ultimate and fundamental principles in large type; a medium-sized work, by placing in smaller type under the general principles their corollaries, deductions, qualifications, and exceptions; and lastly, an exhaustive statement of all decisions, with the minutest possible analysis. My belief is that a treatise thus framed would not only render the learning of law, as well as the search for it, more rapid and exact, but would also be acceptable and

profitable to the extent of encouraging similar efforts by specialists in other departments, and in time furnish the practicable material for a code that would preserve the wealth of the common law and assimilate all but the crude treasures of its storehouse, and successfully bear the test of answering inquiries and intercepting actual disputes.[1]

In this undertaking, the material of the present book was incidentally collected; and being statutory and undeveloped, and hence incapable of the designed treatment, is allowed to see daylight.

[1] These views were criticised, though in a very kindly spirit, in the Albany Law Journal of Feb. 21, 1885, vol. xxxi. p. 141.

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California, Codes, 1876.
Colorado, Gen. Stat. 1883, p. 750.
Connecticut, Gen. Stat. 1875; Am. 1875, p. 40, and 1882, p. 122.
Dakota Territory, Codes, 1883; vol. ii. p. 1022.
Delaware, Rev. Code, 1876, c. 64.
District of Columbia, Rev. Stat. of U. S. for D. C. 1873-74, p. 59.
Florida, McClellan's Digest, 1881, p. 796.
Georgia, Code, 1882, p. 448.
Idaho Territory has no statute on the subject.
Illinois, Starr & Curtis Stat. 1885.
Indiana, Rev. Stat. 1881.
Iowa, 1 McClain's Stat. 1882, p. 603; Am. 1882, p. 9.
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Louisiana, Rev. Stat. 1825.
Maine, Rev. Stat. 1883, c. 33, p. 335.
Maryland, Rev. Code, 1878, p. 286, § 1, Am. 1880, p. 753, § 4, Am. 1884, p. 101, Am. 1884, p. 404.
Massachusetts, Pub. Stat. 1882, c. 75, p. 423.
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Mississippi, Rev. Code, 1880.
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New Jersey, Revision, 1877, p. 806.
New Mexico has no statute on the subject.
New York, 3 Rev. Stat. 2234, 1882, and vol. iv. Penal Code, § 375.
North Carolina, Code, 1883, vol. ii. p. 319.
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Wyoming Territory, Session Laws of 1877, p. 84.
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THE LAW

OF

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LIMITED PARTNERSHIP.

PART I.

NATURE AND FORMATION OF THE RELATION.

CHAPTER I.

DEFINITION, HISTORY, AND EXTENT.

§ 1. **Definitions.** — A Limited Partnership is a partnership in which the liability of some of its members to bear losses is restricted to a defined amount. As such an immunity is utterly repudiated in the common law, these associations are wholly statutory.

The phrase "limited partnership" has now become by usage in the United States — except in Louisiana, where they are called "partnerships *in commendam*" — appropriated to these associations; though the phrase "special partnership" also occasionally appears in some statutes, as in the Ohio statute, § 3161, and all through the statutes of California, Dakota, and Wyoming. In this book the phrase "general partnership" is used in contradistinction to denote the ordinary partnership where all the members, whatever be their liability *inter se*, are liable *in solido* to third persons. It must be noticed, however, that these names "limited partnership" and "general partnership" thirty or forty years ago meant something

very different, and denoted respectively a partnership whose scope or objects were restricted to a certain class of business or particular adventures, or were not so restricted. But an abandonment of the term "general" in the sense of universal will be no loss; for a partnership without any limitation as to its scope and purposes is an anomaly, and, at least as far as I can discover, there are but four cases on record of such general hotchpot or communistic concern.[1] "Special partner" is — except in Louisiana, where he is called "the partner *in commendam*" — the American term for the member whose liability is thus restricted, and "general partner" for the member who conducts the business and is liable *in solido.*

§ 2. There is also a further limited association, forms of which have long been known in France, which has recently been adopted in the statutes of Pennsylvania, New Jersey, Michigan, Ohio, and Virginia (see Part V.), in which all the partners are special, and which constitutes a sort of joint-stock company with a limited liability. These, so far as adopted, have been called "Partnership Associations, Limited," or perhaps "Limited Partnership Associations."

§ 3. **History.** — Very interesting accounts of the history of limited partnerships will be found in Troubat's work and in *Ames* v. *Downing*, 1 Bradf. (N. Y.) 321, 329; s. c. 8 N. Y. Legal Observer, 317 (a case overlooked by Troubat), and a short account also in *Jacquin* v. *Buisson*, 11 How. Pr. 385, 390. They are, however, more or less free

[1] *Rice* v. *Barnard*, 20 Vt. 479; s. c. 50 Am. Dec. 54; *Lyman* v. *Lyman*, 2 Paine C. C. 11; *Houston* v. *Stanton*, 11 Ala. 412; *Gray* v. *Palmer*, 9 Cal. 616.

translations of Troplong, "Du Contrat de Société Civile et Commerciale," tome 1, art. 380 *et seq.*, a work now out of print, from which it appears that the prototype of this form of partnership was known and recognized in the laws of Pisa and Florence as far back as A. D. 1166, of Marseilles in 1253, of France under Louis X. in 1315, and of Geneva in 1588, and has existed in France ever since under the name of "La Société en Commandite."

Until 1673 it was possibly rather a trust than a partnership, the Latin *commendare* signifying "to trust," — though this form of partnership was wholly unknown in the Roman law, as it is also wholly unknown in the law of England and its colonies, except Upper Canada, or Ontario, to-day. In 1673, under an ordinance of Louis XIV., it became distinctly a form of partnership, though it was not until the Code de Commerce that it assumed its present form.

Its rise seems to be attributable to the following causes. In the early part of the Middle Ages all commerce was conducted by and left to the Jews and Lombards, and was completely in their hands, the former of whom had become under the earlier mediæval system an isolated and often cruelly oppressed race, abiding chiefly in Germany and Italy. The Lombards (originally Langobards) for many centuries after they had invaded Italy and had lost their separate language were still in Italian eyes barbarians, and hated as a conquering race or ruling caste, — to which hatred, fear of their restless republicanism probably constantly contributed.

While these two energetic yet despised races monopolized the industrial pursuits of the age, the great bulk

of the wealth of communities was in the hands of the nobles and clergy. But the canon law regarded the business of money-lending as degrading and abhorrent, and prohibited usury as an offence, even explaining the word "usury" — which really comes from *utor*, I use — by means of a far-fetched pun, *Usuria* dicitur quasi ignis *urens.* The capitalists were thus restrained by canonical regulations from increasing their wealth by lending, while pride of caste prevented them from openly seeking gain through the avenues of trade.

§ 4. It was this state of things that led to the devising in Italy, whence it subsequently spread into France, of a plan whereby the nobles embarked their capital with the traders without being known or named, by means of the commercial relationship *accomandita,* thus giving an outlet at once lawful and profitable to an immense amount of capital that would otherwise have lain dormant. This species of association became — and here we are again indebted to Troplong, whose description, though seeming a little fanciful, is probably true — one of the most frequent combinations of trade. It sustained the great and prosperous trade of the Mediterranean and the active and widely extended commerce of the opulent maritime cities of Italy, and even carried merchants to the East in the train of the Crusaders.

§ 5. The Société en Commandite, already known in Louisiana from the time when that State was a French dependency, was adopted in New York from France in 1822, — "the first instance," Kent (3 Com. 36) says, in the history of New York legislation "that the statute law of any other country than that of Great Britain has been closely imitated and adopted." It was said in

Clapp v. *Lacey*, 35 Conn. 463, 464, that Connecticut, like New York, derived its statute in 1824 also from France, and that it was not copied from New York; but Pennsylvania in 1836 adopted the New York statute, and most of the other States have derived theirs from the same source.

§ 6. **Extent of and Uniformities in the American Statutes.** — Limited partnerships have been adopted in every organized subdivision of the United States except three Territories, — Arizona, Idaho, and New Mexico. I say "organized," so as to exclude Alaska and the Indian Territory. In other words, they have been adopted in all the thirty-eight States, in five of the eight organized Territories, in the District of Columbia, and also in Upper Canada, or Ontario.

§ 7. While all these statutes are closely similar in effect, many of them are so nearly *verbatim* copies of one or two original forms as to admit of classification. Thus the statutes of the following States have been cast in the mould of the original New York statute, — Alabama, Arkansas, Colorado, Georgia, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Utah Territory, Wisconsin, and Upper Canada: and the first half of the Michigan statute, District of Columbia, Iowa, Ohio, also clearly belong in the same category, and perhaps also Florida.

The following, though varying from the former in phraseology and occasionally in meaning, are so closely copies of each other, or modelled upon a common original, as to belong in a class together, — Indiana, Maine,

Massachusetts, Montana Territory, Nevada, Oregon, Rhode Island, Virginia, West Virginia, Vermont, and the last half of the Michigan statute.

Virginia and West Virginia are copies of each other; so are Kentucky and Missouri; so are California, Dakota Territory, and Wyoming Territory.

Connecticut, Delaware, New Hampshire, and Washington Territory have cast their statutes in forms differing from the preceding and from each other, though close resemblances may be found.

This classification is one of form rather than of effect; other classifications or sub-classes could be made according to the fancy of the reader. A more exact comparison will be made as we take up the statutes section by section.

§ 8. **Foreign Authorities.**—The most prominent French authors whose works contain chapters on the Société en Commandite are Delangle, Malpeyre et Jourdain, Pardessus, and latest, Troplong. These works are now all out of print, but they constituted the foundation of Troubat's work on "Limited Partnership," which appeared in 1853, at a time when there were but few American cases; and in the pages of Troubat the foreign law will be found in an exceedingly interesting shape and very full. The only French work of any magnitude that I have consulted or am aware of is that of J. Bédarride, published in two volumes in 1877, "Commentaire de la Loi du 24 Juillet, 1867, sur Les Sociétés en Commandite par Actions, Anonymes et Coopératives." It is, however, upon a form of limited partnership unknown in this country; and in fact the entire body of the foreign law

is useless to us. Our construction of the statutes and the system is so radically different that it has no analogue elsewhere: to have ingrafted the foreign rules of construction on our law, as said by Bigelow, C. J., in *Pierce* v. *Bryant*, 5 Allen, 91, 93, "would have been to make a great inroad on the well-settled doctrines of the common law." Though in name the child of the French *commanditaires* and grandchild of the Italian *accomandita*, the American system of limited partnership has in reality no blood in common with them.

CHAPTER II.

OBJECTS AND CONSTRUCTION.

§ 9. It is of importance to construct some general canons of interpretation, with a view to applying these statutes. In this the primary search must be for the objects of the statutes. Moreover, it may also be of use to collate the various dicta and opinions upon the subject.

§ 10. **Leading Ideas of the Statutes.** — These are two, — First, the bringing into co-operation for mutual and public benefit men having capital and willing to risk a limited amount of it, provided the hazards of the enterprise would not involve their private fortunes beyond a calculable degree, and men without capital but with enterprise, skill, and capacity; and thus develop the industrial prosperity of the country by enlisting the energy and diligence of the young with the dormant accumulations of the more advanced. Or, as stated in Levi's "Mercantile Law" (p. 215), a limited partnership is essentially a union of labor and capital.

The object is to allow the capitalist to risk only the capital originally subscribed, *Clapp* v. *Lacey*, 35 Conn. 463, 466. One aim is to benefit trade and to aid young men of integrity and capacity but without means, *Riper* v. *Poppenhausen*, 43 N. Y. 68, 73; "to encourage the employment of capital, without personal activity on the part of its owners, by associating it with industry and enterprise which might not be possessed of capital," *Singer* v. *Kelly*, 44 Pa. St. 145, 149.

Second, the protection of that part of the public who deal with and trust the firm. As they cannot resort to an individual liability *in solido* of the capitalist partner, it is only just that they be enabled to estimate with the greatest possible accuracy the chance of a return for credit given to the firm.

§ 11. A moment's reflection shows that the rules of construction applicable to one of these two objects must be totally different from those necessary to the attainment of the other.

Thus to the first object, which obviously relates to the applicability of the statute, must be applied a broad and liberal construction which will foster and encourage enterprise, enlarge that application, and furnish the amplest protection possible to the special partner.

As has been observed, the statute is intended wholly for the protection of the special partner, and not of those dealing with him. They have all the protection they need at common law, and he seeks exemption from it, *Durant* v. *Abendroth*, 41 N. Y. Superior Ct. 53, 61. The statute was intended for the mutual protection of the special partner and of those dealing with him, *Levy* v. *Lock*, 47 How. Pr. 394, 397; s. c. 5 Daly, 46, 49. The act was not conceived in a spirit hostile to those who might seek to avail themselves of it, *Lachaise* v. *Marks*, 4 E. D. Smith, 610, 626. A construction was deprecated on the ground that it would seem harsh and discourage such partnerships in *McArthur* v. *Chase*, 13 Gratt. (Va.) 683, 684, and in *McKnight* v. *Ratcliff*, 44 Pa. St. 156, 167.

"It is not intended to deny that the requisites of the statute must be strictly pursued in organizing and conducting limited partnerships; but this should not change the rule of interpretation, which requires in public beneficial statutes that construc-

tion which will promote their objects rather than destroy them." *Singer* v. *Kelly*, 44 Pa. St. 145, 148.

§ 12. To the second object, — the protection of those dealing with the firm, — it is equally just and proper that applicable provisions of the statute be substantially, if not strictly, construed, and that where the rights of third persons are or may be imperilled, or where a loose construction applied to a special partner, though he obviously acted in good faith, would open a door to evasion or concealment, a strict compliance alone will enable him successfully to invoke its protection.

§ 13. In other words, a broad and liberal interpretation is desirable to ascertain the scope of the statute; but the observance of the provisions thus ascertained must always be substantial, and, where necessary, strict. There is no hardship in this, for it is always easy for the special partner to see that all the statutory provisions are complied with.

Or, in still other words, provisions for the protection of third persons are to be liberally construed in favor of such persons, which means strictly against the special partner; and provisions which cannot affect rights of third persons will be liberally construed, so as not to forfeit the protection of the statute without reason.

These general reflections will suffice to assist in understanding and reconciling the various statements of the decisions.

§ 14. **Foreign Law not applicable.** — The legislature in adopting limited partnerships from the civil law did not intend "to engraft on the stock of the common law

all the rules of construction which are applied to such a contract in those countries where it forms part of the regular system of public laws. To have done so would have been to make a great inroad on the well-settled doctrines of the common law applicable to partnerships." *Pierce* v. *Bryant*, 5 Allen, 91, 93.

§ 15. **Common Law.** The statute must be integrated with the common law and viewed by its lights. But though the common law was called by Hoffman, J., in *Jacquin* v. *Buissòn*, 11 How. Pr. 385, 393, the "strong enemy of limited partnerships," yet that the statutes are to be treated as in derogation thereof is by no means unanimously conceded.

Thus the Supreme Court of Connecticut say: "The statute, in our judgment, is not in derogation of the common law, because limited partnerships are unknown to that law, but an enabling, enlarging, and regulating statute, remedial in its character, and not, therefore, to be construed strictly, as claimed. We discover nothing in its character, purpose, or provisions requiring any other than an ordinary and reasonable construction." *Clapp* v. *Lacey*, 35 Conn. 463, 466. "This may well be regarded as a remedial statute, and should receive a liberal construction, with a view to suppress the mischief and advance the remedy." *Riper* v. *Poppenhausen*, 43 N. Y. 68, 73.

On the other hand, Judge Woodruff, speaking of a contribution other than in cash, says: "The parties cannot claim under the statute, which derogates from the general rule of law, without showing a strict compliance with the statute" (U. S. C. C., 1874). In re *Merrill*, 12 Blatchf. 221, 224; s. c. 13 Bankr. Reg. 91, 93. The statute must be substantially complied with, for the common law did not admit of partnerships with restricted liability. *Henkel* v. *Heyman*, 91 Ill. 96, 101.

A strict construction was said to be proper, because the act is in derogation of the common law, in *Durant* v. *Abendroth*, 41 N. Y. Superior Ct. 53, 59.

§ 16. **Unnecessary Strictness avoided.** — A strict interpretation will not be adopted even where it relates to the conduct of the partners, unless there is a reason for it. It is not every technical violation, every failure to comply with the letter of the law, that should deprive the special partner of the protection of the statute. *Riper* v. *Poppenhausen*, 43 N. Y. 68, 73.

Unless it plainly appears that liability without reference to knowledge or intentional violation was meant, we should not give the statute a construction tending to such penal consequences. It would be contrary to natural justice to arrive at such consequences by interpretation. *Singer* v. *Kelly*, 44 Pa. St. 145, 147.

Thus, under a statute allowing the firm-name to consist of the name of any general partner with the addition of "& Co.," but required a sign to be up containing the names of all the partners, the Common Pleas Court regarded the sign and not the name as the test of who were general partners, and held that the firm-name, Bullock's Sons, was sufficient, though the firm consisted of four brothers, two being general and two special partners. *Vilas Bank* v. *Bullock*, 10 Phil. 309; s. c. 1 Weekly Notes, 219.

"In the construction of the statute the protection of the creditors against fraud, evil device, and every attempt to evade its strongest provisions is of primary importance. But more than this would be unreasonable, harsh, and subversive of the design of the act itself, which was not conceived in a spirit hostile to those who might seek to avail themselves of its benefits." *Lachaise* v. *Marks*, 4 E. D. Smith, 610, 626.

"While its provisions should be rigorously invoked and applied in behalf of one who suffers by their violation, a wise discrimination should be exercised in their application to one who seeks to obtain an undue advantage thereby." *Levy* v. *Lock*, 47 How. Pr. 394, 397; s. c. 5 Daly, 46, 49.

Lack of intention to violate the statute is different before and after the partnership is formed. A disregard of its provisions, which are pre-requisites for the formation of a limited partnership, without the knowledge of the special partner, is no protection to him; there is no limited partnership until legally instituted. But a violation of the provisions, which are a guide for the conduct of its affairs after it has had a legal inception, does not forfeit the protection of the statute unless the member is chargeable with a knowledge of the infraction and an intention to disobey its requirements. *Van Ingen* v. *Whitman*, 62 N. Y. 513, 523.

§ 17. **Verbal Mistakes.** — A mistake in the publication of surnames so as to give a slightly different sound, as "Argale" for "Argall," is a substantial compliance with the statute. The true test is whether it was calculated to mislead. *Bowen* v. *Argall*, 24 Wend. 496.

The exact words of the statute need not be followed; thus, stating that the capital has been actually paid in is equivalent to stating that it has been paid in "in cash." *Johnson* v. *McDonald*, 2 Abb. Pr. 290.

Certifying that the general partners are A and B, both of Brooklyn, is sufficient without the words "resident in;" that is, the statement of locality will not be regarded as mere *descriptio personæ*, as in an ordinary affidavit. *Lachaise* v. *Marks*, 4 E. D. Smith, 610.

Defects of mere form may be disregarded. *Smith* v. *Argall*, 6 Hill, 479, 481.

An unintentional publishing November for October for the

commencement of the partnership, where no harm resulted, was held immaterial in *Madison County Bank* v. *Gould*, 5 Hill, 309; and this point was cited with approval in *Riper* v. *Poppenhausen*, 43 N. Y. 68, 73.

Yet a mistake in the newspaper in publishing the capital of the special partner as $5,000 instead of $2,000 is fatal, for it misleads. *Smith* v. *Argall*, 6 Hill, 479; affirmed in Court of Appeals, *Argall* v. *Smith*, 3 Denio, 435.

§ 18. In the following cases it was said that a strict compliance with the act was necessary, — *Maloney* v. *Bruce*, 94 Pa. St. 249; *Richardson* v. *Hogg*, 38 Pa. St. 153; and in syllabus but not in opinion in *Pierce* v. *Bryant*, 5 Allen, 91; *Lachaise* v. *Marks*, 4 E. D. Smith, 610, 626. Must be substantially complied with, but this is sufficient: *Madison County Bank* v. *Gould*, 5 Hill, 309, 312; *Levy* v. *Lock*, 47 How. Pr. 394, 395; s. c. 5 Daly, 46, 48; *Bowen* v. *Argall*, 24 Wend. 496, 501; *Smith* v. *Argall*, 6 Hill, 479, 481; *Andrews* v. *Schott*, 10 Pa. St. 47, 51; *Henkel* v. *Heyman*, 91 Ill. 96, 101. At least substantially: *Pfirrmann* v. *Henkel*, 1 Ill. App. 145, 149. Substantially and even strictly: *Argall* v. *Smith*, 3 Denio, 435. Both strictly and substantially: *Holliday* v. *Union Bag and Paper Co.*, 3 Colorado, 342, 344.

CHAPTER III.

FORMATION OF THE PARTNERSHIP.

STATUTES.

§ 19. **For what Business.** — "Limited partnerships for the transaction of any mercantile, mechanical, or manufacturing business within this State may be formed by two or more persons, upon the terms, with the rights and powers, and subject to the conditions and liabilities, herein prescribed ["mentioned" in Upper Canada]; but the provisions of this act shall not be construed to authorize any such partnership for the purpose of banking or making insurance."

ALA. § 2063, same as above.

ARK. §§ 4348, 4374, allows insurance, navigation, construction of "railroads, canals, etc."

DEL. § 1, same as above.

DIST. COL. § 488, as above, omitting the exception of banking and insurance.

FLA. § 1, as above, adding agricultural and commercial, and excepts banking, insurance, railroad, or canal enterprises.

GA. § 1920, as above, adding agricultural and commercial.

KAN. § 2347, same as above.

KY. § 1, as above, but adds agricultural, transporting coal, wood, and lumber, and excepts banking, brokerage, or insurance; omits "within this State."

MD. § 1, amended in 1880 to permit banking.

ME. § 1, omits "within this State."

MICH. § 2341, as above.

MINN. § 1, same as above.

MISS. § 1005 (making quite a change from § 1857 of its Code of 1871), for mercantile, commercial, or manufacturing, and omits the exception.

MO. § 3401, same as Ky.

MON. TY. § 943, same as above, adding mining.

N. C. § 3088, as above.

Neb. § 1, same as above.

Nev. § 468, as above, adding mining, and omits the exceptions.

N. J. § 1, same as above, adding agricultural, mining, and transporting of coal.

N. Y. § 1, adds "or any other lawful trade or business."

Ohio, § 3141, as above, adding mining.

Oregon, § 1, as above, but omits the exception of banking and insurance.

Pa. § 1, same as above, adding agricultural, mining, and transporting coal.

R. I. § 1, as above, adding mining and transporting of coal, and excepts insurance and banks of issue and circulation.

S. C. § 1303, as above, but adds transportation of passengers, products of the soil or merchandise, and excepts banking or insurance.

Tenn. §§ 1734, 1734 *a*, as above, adding agricultural and mining.

Tex. § 3442, as above, adding "or other business," and excepts insurance and banking.

Up. Can. § 1, as above.

Utah Ty. § 1, as above, adding mining.

Va. § 1, and W. Va. § 1, same as above, but excepts banking, brokerage, or insurance.

Vt. § 3689, as above.

Wash. Ty. § 2370, as above, but omits the exception of banking or insurance.

Wis. § 1703, same as above.

Ark. § 4374 may be formed, etc., and to advance such sums as may be deemed necessary from time to time.

"Limited partnerships for the transaction of any lawful business except the business of insurance, may be formed by two or more persons in the manner hereinafter provided."

Cal. § 7477.

Col. § 2514, and Ill. § 1, do not restrict it to any business nor except any.

Conn. § 1, any business except banking or insurance.

Dak. Ty. § 1449.

Ind. § 6033, add after business "in this State."

Iowa, § 2147, any lawful business within the State, omits the exception.

LA. § 2811. MASS. § 1. N. H. § 1.

OHIO, § 3160, also adds of a partnership for manufacturing or mining if it "purchases or possesses lands necessary or convenient for carrying on its business; it may rent, cultivate, or improve such lands, and the same shall not be deemed a departure from the regular business of such partnership."

WY. TY. § 1.

§ 20. **Members — Their Liability and Nature of Capital.** — "Such partnerships shall ["may" in Upper Canada, New York, and Pennsylvania] consist of one or more persons who shall be called general partners, and who shall be jointly and severally responsible as general partners now are by law, and of one or more persons who shall contribute in actual cash payments a specific sum as capital to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership beyond the fund so contributed by him or them to the capital."

ALA. § 2064.	CAL. § 7478.	CONN. §§ 2, 7.
DAK. TY. § 1450.	DEL. § 2.	DIST. COL. §§ 489, 490, 491.
GA. § 1922.	IND. § 6034.	
IOWA, § 2148.	KY. §§ 2, 8.	MASS. § 2.
MD. § 2.	ME. § 1.	MINN. § 2.
MISS. § 1006.	MO. §§ 3402, 3408.	MON. TY. § 944.
N. C. § 3089.	NEV. § 469.	N. H. § 2.
N. J. § 2.	N. Y. § 2.	OHIO, § 3142.
OREGON, § 2.	PA. § 2.	R. I. § 2.
S. C. § 1304.	TEX. § 3443.	UP. CAN. § 2.
VA. § 2.	VT. § 3690.	W. VA. § 2.
WASH. TY. § 2371.	WIS. § 1704.	WY. TY. § 2.

ARK. §§ 4349, 4373, 4375, the capital may be also contributed in merchandise or real or personal property, the value being certified under oath, and any sums not paid at once shall be secured by mortgage.

The following States also modify the above by specifying that the special partner may contribute in cash or other property at cash value.

Col. § 2515.	Fla. § 3.	Ill. § 2.
Kan. § 3348.	La. § 2810.	Mich. § 2342.
Neb. § 2.	Utah Ty. § 2.	

In Florida the property must be appraised and sworn to.

In District of Columbia and Maryland the special partners are not to exceed six.

In Montana and Washington Territory there must be two or more special partners and two or more general partners.

Fla. § 1 (2), imposes a liability equal to the capital in addition thereto.

Col. § 2527, also adds that any married woman may become a special partner either with her husband or with any other, as if a *feme sole*, and may be a witness for or against her husband.

§ 21. **Certificate.** — "The persons desirous of forming such partnership shall make and severally sign a certificate, which shall contain, —

"1. The name or firm under which such partnership is to be conducted.

"2. The general nature of the business intended to be transacted.

"3. The names of all the general or special partners interested therein, distinguishing which are general and which are special partners, and their respective [" usual," Upper Canada] places of residence.

"4. The amount of capital which each special partner shall have contributed to the common stock.

"5. The period at which the partnership is to commence and the period at which it will terminate."

Ala. § 2066.	Ark. § 4351.	Cal. § 7479.
Col. § 2517.	Conn. § 4.	Dak. Ty. § 1451.
Del. § 3.	Dist. Col. § 492.	Fla. § 2.

GA. § 1923.	ILL. § 4.	IND. § 6035.
IOWA, § 2150.	KAN. § 3350.	KY. § 3.
MASS. § 4.	MD. § 3.	ME. § 2.
MICH. § 2344.	MINN. § 4.	MISS. § 1007.
MO. § 3403.	MON. TY. § 945.	N. C. § 3090.
NEB. § 4.	NEV. § 470.	N. H. § 3.
N. J. § 4.	N. Y. § 4.	OHIO, § 3143.
OREGON, § 3.	PA. § 4.	R. I. § 3.
S. C. § 1306.	TENN. § 1736.	TEX. § 3445.
UP. CAN. § 4.	UTAH TY. § 4.	VA. § 3, & W. VA. § 3.
VT. § 3691.	WASH. TY. § 2372.	
WIS. § 1705.	WY. TY. § 3.	

The following States require the certificate to be in duplicate, — CALIFORNIA, DAKOTA, OREGON, WASHINGTON TERRITORY, and WYOMING TERRITORY.

The following require a statement of the places where the business is situated, — KENTUCKY, MISSOURI, MISSISSIPPI.

The following require a statement of the nature of the capital (among the kinds in Florida is enumerated "business experience"): FLORIDA, NEBRASKA, UTAH.

In GEORGIA the signature may be by an attorney in fact if his power is recorded.

In ILLINOIS may also provide the terms of dissolution, and that death of any shall not dissolve.

In TENNESSEE the certificate is called "articles of partnership."

In MISSOURI, when the capital is to be paid, if not paid in, and the amount each special partner may annually withdraw.

In CONNECTICUT shall specify also which of the general partners are authorized to transact business and sign, and there is no responsibility for the acts of any other general partner.

UP. CAN. § 5, enacts also that "the certificate shall be after the form in the schedule annexed to this act, and signed by the several persons forming such partnership before a notary public, who shall duly certify the same." (The form will be found in the Appendix.)

§ 22. —its **Acknowledgment.**— "The certificate shall be acknowledged by the several persons signing the same before" [naming the officer].

ALA. § 2067.	ARK. § 4352.	CAL. § 7480.
COL. § 2518.	CONN. § 4.	DAK. § 1452.
DEL. § 3.	DIST. COL. § 493.	FLA. § 3; two witnesses.
GA. § 1924.	ILL. § 5; see IND. § 6036.	KAN. § 3351.
IOWA, § 2151.	LA. § 2819.	MASS. § 5 provides for non-resident partners.
KY. § 4.	MICH. § 2345.	N. C. § 3091.
MD. § 4, amended 1884.	MINN. § 5.	N. H. § 4.
MISS. § 1008.	MO. § 3404.	OHIO, § 3144.
NEB. § 5.	NEV. § 471.	PA. § 5.
N. J. § 5.	N. Y. § 5, amended 3 R. S., p. 2239.	TENN. § 1737.
OREGON, § 3.	S. C. § 1307.	WASH. TY. § 2372.
R. I. § 4.	UTAH TY. § 5.	
TEX. § 3446.	WY. TY. § 4.	
WIS. § 1706.		

For UP. CAN. § 5, see bottom of preceding page.

§ 23. —its **Record.**— "The certificate so acknowledged and certified shall be filed in the office of [naming the officer], in which the principal place of business of the partnership shall be situated; and shall also be recorded by him, at large, in a book to be kept for that purpose, open to public inspection. If the partnership shall have places of business situated in different counties, a transcript of the certificate and of the acknowledgment thereof duly certified by the [clerk] in whose office it shall be filed, under his official seal, shall be filed and recorded in like manner in the office of the [clerk] of every such county."

ALA. § 2068.	ARK. §§ 4353, 4354.	CAL. § 7480.
COL. § 2519.	CONN. § 4.	DAK. TY. § 1452.
DEL. § 3.	DIST. COL. § 493.	FLA. § 4.
GA. § 1925.	ILL. § 6.	IND. § 6036.
IOWA, § 2152.	KAN. §§ 3352, 3353.	KY. § 4.
LA. § 2819.	MASS. § 5.	MD. § 4.
ME. § 3.	MICH. §§ 2346, 2347.	MINN. § 6.

Miss. § 1008.	Mo. § 3404.	Mon. Ty. § 946.
N. C. § 3092.	Neb. § 6.	Nev. § 471.
N. H. § 4.	N. J. § 6.	N. Y. § 6.
Ohio, § 3145.	Oregon, § 4.	Pa. § 6.
R. I. § 4.	S. C. § 1308.	Tenn. § 1738.
Tex. § 3447.	Utah Ty. § 6.	Va. § 4, and W. Va. § 4, am. 1883.
Vt. § 3692.	Wash. Ty. § 2372.	
Wis. § 1706.	Wy. Ty. § 4.	

Up. Can. § 6, omits the last half, beginning, "If the partnership."

California, Dakota Territory, and Wyoming Territory require the certificate to be in duplicate.

Georgia provides for signing by recorded power of attorney.

The provisions of some of the above States are much shorter than the above form.

§ 24. **Affidavit.** — "At the time of filing the original certificate, with the evidence of the acknowledgment thereof as before directed, an affidavit of one or more of the general partners shall also be filed in the same office, stating that the sums specified in the certificate, to have been contributed by each of the special partners to the common stock, have been actually and in good faith paid in cash."

Ala. § 2069.	Ark. § 4355.	Col. § 2520.
Conn. § 4.	Dist. Col. § 494.	Fla. § 5.
Ga. § 1926.	Ill. § 7.	Iowa, § 2153.
Kan. § 3354.	Ky. § 3.	Md. § 5.
Mich. § 2348.	Minn. § 7.	Miss. § 1009.
Mo. § 3403.	N. C. § 3093.	Neb. § 7.
N. H. § 5.	N. J. § 7.	N. Y. § 7.
Pa. § 7.	S. C. § 1309.	Tenn. § 1739.
Tex. § 3448.	Utah Ty. § 7.	Va. § 3, and W. Va. § 3.
Wis. § 1707.		

Cal. § 7481, Dak. Ty. § 1453, and Wy. Ty. § 5 require an affidavit of each partner.

Those States that allow the capital to be contributed in other

than actual cash modify the affidavit accordingly; namely, COLORADO, FLORIDA, ILLINOIS, KANSAS, MICHIGAN, NEBRASKA, and UTAH TERRITORY.

In COLORADO the special partner makes the affidavit.

In KENTUCKY and MISSOURI the verification is to the certificate.

The following States do not mention an affidavit, — DELAWARE, INDIANA, MAINE, MASSACHUSETTS, MONTANA TERRITORY, NEVADA, OHIO, OREGON, RHODE ISLAND, VERMONT, WASHINGTON TERRITORY, and UPPER CANADA.

In MISSISSIPPI it must be also stated that no part of the contribution is in stocks, credits, or any kind of security.

§ 25. **When begins. — False Statement.** — "No such partnership shall be deemed to have been formed until a certificate shall have been made, acknowledged ["certified," Upper Canada, § 8], filed, and recorded, nor until an affidavit shall have been filed as above directed; and if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners."

ALA. §§ 2070, 2071.	ARK. § 4356.	CAL. §§ 7480, 7482.
COL. § 2521.	CONN. §§ 4, 5.	DAK. TY. §§ 1452, 1454.
DEL. § 3, requires record.	DIST. COL. §§ 495, 496.	FLA. § 7.
GA. § 1927.	ILL. § 8.	IND. § 6036.
IOWA, § 2154.	KAN. § 3355.	KY. § 4.
MASS. § 4.	MD. § 6.	ME. §§ 3, 4.
MICH. § 2349.	MINN. § 8.	MISS. § 1010.
MO. §§ 3403, 3404.	MON. TY. § 946.	N. C. §§ 3094, 3095.
NEB. § 8.	NEV. § 471.	N. H. § 4.
N. J. § 8.	N. Y. § 8.	OHIO, §§ 3145, 3147.
OREGON, § 4.	PA. § 8.	R. I. § 4.
S. C. § 1310.	TENN. §§ 1740, 1741.	TEX. § 3449.
UP. CAN. § 7.	UTAH TY. § 8.	VA. § 4, and W. VA. § 4.
VT. § 3692.	WASH. TY. § 2373.	
WIS. § 1708.	WY. TY. §§ 4, 6.	

DISTRICT OF COLUMBIA has false affidavit not the result of accident or mistake.

MAINE, a false affidavit which misleads or is intentionally false makes partner liable to persons injured.

CAL. §§ 7501, 7502, DAK. TY. §§ 1468, 1469, and WY. TY. §§ 19, 20, falsity must be wilfully made or permitted, or materially defective, and then liable to creditor actually misled.

In FLORIDA and MISSOURI the penalty for false affidavit is that of perjury.

In KENTUCKY, MISSOURI, and OREGON, the partnership is not formed until the publication is made.

Of the above statutes, those of IOWA, MASSACHUSETTS, NEW HAMPSHIRE, VIRGINIA, and WEST VIRGINIA omit the first half of the above section, and those States that do not require an affidavit (see § 24) modify the section accordingly.

§ 26. **Publication.** — "The partners shall immediately publish the terms of the partnership, when registered,[1] for at least [six] weeks immediately after such registry, in two newspapers [to be designated by the clerk of the county] in which such registry shall be made, and to be published in the senate district or city or town in which their business shall be carried on; and if such publication be not made, the partnership shall be deemed general."

ALA. § 2072.	ARK. § 4357.	CAL. § 7483.
COL. § 2522.	CONN. § 6.	DAK. TY. § 1455.
DEL. § 3.	DIST. COL. §§ 497, 498.	FLA. § 8.
GA. § 1928.		ILL. § 9.
IND. § 6037.	IOWA, § 2155, am. in 1882.	KAN. § 3356.
KY. § 4.		MASS. § 6.
MD. § 7.	MICH. § 2350.	MINN. § 9.
MISS. § 1011.	MO. § 3404.	N. C. § 3096.
NEB. § 9.	NEV. § 472.	N. J. § 9.

[1] Occasionally the word "requested" is met with, instead of registered; but this is a mistake originating in a misprint in the New York statute.

N. Y. § 9.	Ohio, § 3146.	Oregon, § 4.
Pa. §§ 9, 10.	S. C. § 1311.	Tenn. § 1742.
Tex. § 3450.	Utah Ty. § 9.	Va. § 4, and W. Va. § 4.
Vt. § 3693.	Wash. Ty. § 2373.	
Wis. § 1709.	Wy. Ty. § 7.	

A copy of such certificate shall, immediately after such filing, be published, etc. Me. § 5; N. H. § 4; R. I. § 5.

Montana Territory, among other blunders in its badly drawn act, says nothing as to publication, although in § 953 it requires a dissolution to be "published in the county where the certificate of the foundation [formation] of such partnership was published."

Upper Canada and Louisiana require no publication.

Connecticut does not specify any consequences.

§ 27. —**Proof of Publication.** — "Affidavits of the publication of such notice by the [printers] of the newspapers in which the same shall be published may [" shall," District of Columbia, Maryland, and Mississippi] be filed with the [recorder], and shall [" will," Tennessee] be [" presumptive," California, Dakota, and Wyoming Territory] ["*prima facie*," District of Columbia] evidence of the facts therein contained."

Ala. § 2073.	Ark. § 4358.	Cal. § 7484.
Dak. Ty. § 1456.	Dist. Col. § 499.	Ga. § 1929.
Ill. § 10.	Iowa, § 2156.	Kan. § 3357.
Md. § 8.	Mich. § 2351.	Minn. § 10.
Miss. § 1012.	N. C. § 3097.	Neb. § 10.
N. J. § 10.	N. Y. § 10.	Pa. § 11.
S. C. § 1312.	Tenn. § 1743.	Tex. § 3451.
Utah Ty. § 10.	Wis. § 1710.	Wy. Ty. § 8.

The following wholly omit this provision, — Colorado, Connecticut, Delaware, Florida, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Missouri, Montana Territory, Nevada, New Hampshire, Ohio, Oregon,

RHODE ISLAND, VIRGINIA, VERMONT, WEST VIRGINIA, WASHINGTON TERRITORY, and UPPER CANADA (no publication in last being required).

§ 28. There is nothing in the letter or policy of the statute to prevent the change of an existing business or general partnership into a limited one. A general partner, who by reason of age or infirmity desires to withdraw from the active management of the business, is not forbidden to place it in the hands of co-partners, risking only his capital, and at the same time securing to the new concern the good will and advantages possessed by the former one, provided only that the nature of the contribution of the special partner as to being actual cash where that is required, or otherwise, is complied with. *Metropolitan National Bank* v. *Sirrett*, 97 N. Y. 320, 329; s. c. 15 Abb. New Cas. 318, 330.

The Ohio Statute, § 3150, especially recognizes the organization of a firm of general partners into a limited one, and using the same name.

§ 29. The steps to be taken in forming the partnership must be exactly complied with. This is of the utmost importance, for no limited partnership is formed until then; and if any omission deceives, or tends to deceive, any third person who becomes a creditor, or if the statute is not complied with, the creditor will be protected and the special partner sacrificed. On this subject the law is imperative. It will be no excuse for him that he has done his part or was innocent of wilful intent or knowledge of violation. He must not only do his part in the formation of the partnership, but must see that his co-partners, general or special, do their parts

and do them properly (§ 49). As stated in *Hubbard* v. *Morgan* (U. S., D. C. for N. Y., 1839, cited in 3 Kent, Com. 39, and not elsewhere reported), the special partner must at his peril see that the law is complied with in all its essentials, or he will be liable as a general partner.

He must not only pay in his capital as hereafter shown, and sign and acknowledge the certificate, but must see that other special partners pay in their capital, and see that all the others also sign and acknowledge the certificate, and that it is filed, and that a general partner makes and files the proper affidavit in those States requiring it. The limited partnership is then, and not till then, formed; but its terms must be properly published, and the special partner must see that this is done, and that the newspaper insertion is correct, for if it is not, he loses the protection of the statute. On this subject the law is inexorable; these acts *must* be done. They are the essential precautions of the law, which neither honesty of purpose nor accidental mistake will supersede. If they are not done, the public will be protected and the partner sacrificed. Nor is it any hardship nor unjust that this should be so. No impossibility is required. And after this point is passed, the special partner will no longer be held liable for any acts of others done without his knowledge.[1]

§ 30. There is no reason, however, why the assumption by the contract of partnership of a greater liability by the special partner than the statute imposes should

[1] In Cal. § 7503, Dak. § 1470, and Wy. Ty. § 21, it is provided that an error in the formation, if in good faith, will not charge a special partner on a contract in which the fact of a limited partnership and the names appeared in writing.

affect his relation as a special partner. An agreement by him to bear a greater proportion of losses is in the interest of creditors, and he is therefore not prohibited from extending his liability or assuming risks beyond the loss of his capital. *Metropolitan National Bank* v. *Sirrett*, 97 N. Y. 320, 331; s. c. 15 Abb. New Cas. 318, 332.

The principles of construction of the statutes have been examined in Chapter II., and the general consequences of neglect to follow the statute will be examined in Chapter VI., when we come to ascertain the relations of the partners to each other and to the firm. The following specific observations and authorities on the above sections of the statute are placed here.

§ 31. **Certificate and Affidavit.** — If the certificate is not acknowledged, no limited partnership is formed, though all other steps were taken. *Fox* v. *Graham*, Michigan Nisi Prius Cases, 90. The certificate was objected to because acknowledged before an officer not enumerated among those authorized, being before the Recorder instead of a judge of the County Court, but no ruling was made on the point, in *Hampden Bank* v. *Morgan*, 2 Haz. U. S. Comm'l and Statis. Reg. 57 (U. S. C. C. 1840).

Describing the business merely as "general dealers," not stating in what they dealt, was held not a sufficient compliance with the statute to protect the special partners. *Benedict* v. *Van Allen*, 17 Up. Can. Q. B. 234.

Further examples will be found hereafter under Chapter IV.

The affidavit need not follow the exact words of the statute. Thus, if it states that the capital has been

actually paid in, and refers to the certificate in which it is averred to be in cash, this was held equivalent to stating that it is "in cash." *Johnson* v. *McDonald*, 2 Abb. Pr. 290. But the details of the partnership contract are not necessary; and under the lenient rules of Louisiana, if a general intent to be a special partner appears, it is enough. See *Ulman* v. *Briggs*, 32 La. Ann. 657, and compare on publication of renewal *Metropolitan National Bank* v. *Sirrett*, 97 N. Y. 320, 331; s. c. 15 Abb. New Cas. 318, 332.

§ 32. **— stating Residence.** — Stating the residence of the partners as of a certain city, without giving street and number, is sufficient. Thus, stating they were of Brooklyn, King's County, N. Y., was held sufficient in *Lachaise* v. *Marks*, 4 E. D. Smith, 610; and it was given as the city of New York: but no suggestion of insufficiency was made on this account in *Bowen* v. *Argall*, 24 Wend. 496, 501.

As to the method of statement, so long as the fact is certified, it is of no consequence that it is averred inferentially. Thus, certifying that the parties are A and B, both of Brooklyn, King's County, N. Y., was held not a mere *descriptio personæ*, but a sufficient statement of residence without the words "resident in," or the like. It is not like the case of an ordinary affidavit, where A and B, of Brooklyn, say, etc., for there what they say only is sworn to, but here the terms of the statute are met; for description is the very object of the statute. *Lachaise* v. *Marks*, 4 E. D. Smith, 610.

§ 33. **Filing and Recording.** — Filing the certificate, and, where an affidavit is required, the affidavit, being for

the protection of the public, is, like proper publication, absolutely essential; and the fact that its accidental omission was without fault of the special partner and unknown to him — as where a messenger was sent to file the documents, and by reason of mistake, inadvertence, or ignorance, he fails to file or withdraws them — is no excuse whatever for non-compliance with the statute. The absence of motive is entirely immaterial; the rights of third persons are just as effectually prejudiced. The following cases, both concerning the same partnership and on substantially the same facts, illustrate and settle this principle.

On March 3 the proper papers, accompanied by the necessary fees, were given to a messenger to take to the clerk's office to be filed and recorded. The messenger took them to the wrong window, and was told to apply at the next window. At the next window he told the clerk he wanted the papers filed and recorded; but this window was that of the marriage license and certificate clerk, who, supposing that a certificate of the official character of the notary was wanted, certified this fact on the paper and handed it back. At this point the reports of the two cases vary. In the case in the Supreme Court (91 Ill. 96), it was averred that the clerk had the papers long enough to record them. The messenger on receiving back the papers took them to the partners, and they, seeing the clerk's signature, supposed the proper steps had been taken and put them in their safe, whence on October 30 they were taken back to the clerk's office and properly recorded. The partnership was held a general one.

The Supreme Court, p. 102, and the lower court, p. 152, said that "filed" meant placed to be kept, or placed and left among the files, and not merely temporarily deposited, and is not

like "filing for record," as of deeds where there may be a withdrawal after record. The Supreme Court, p. 103, says: "The language here does not indicate that the filing is to be temporary merely, but permanent." Like filing a pleading, it becomes part of the permanent records. *Henkel* v. *Heyman*, 91 Ill. 96; *Pfirmann* v. *Henkel*, 1 Bradw. (Ill. App.) 145.

And it seems that the papers were left for record, but not recorded, and it was held not to be a limited partnership, in *Gray* v. *Gibson*, 6 Mich. 300.

§ 34. The statute does not require the filing and record to be of any particular time, but merely that until all steps are taken, down to the time of publishing, the partnership has not been formed as a limited one (§ 25); hence, if launched, it is general, but convertible into a limited one by completing the steps.

Thus, where a limited partnership was contracted by due execution of the certificate on May 17, but the certificate and affidavit were not filed and publication begun for twenty-eight days afterwards, on June 14, it was said by the court that the execution and filing were not required to be contemporaneous. The only disability imposed is that no limited partnership is formed until then; and as to subsequent creditors, its validity is not impaired by the delay. *Levy* v. *Lock*, 47 How. Pr. 394, 395; s. c. 5 Daly, 46, 48.

And where the record was required to be within six days of the contract of partnership, this was held, under the lenient construction adopted in Louisiana, to be directory only, — that until that time the partner *in commendam* is an ordinary dormant partner, but after record those who deal with the firm have notice of the extent of his responsibility. *Lachomette* v. *Thomas*, 5 Rob. (La.) 172.

§ 35. **Neglect of Recording Officer.** — It is even suggested in both the Illinois cases above cited that perhaps the absence of record after filing, due to the clerk's or recorder's neglect, may not result in general liability.

The Supreme Court stated that "had the certificate, acknowledgment, and affidavit been left with the county clerk with directions to file them, his refusal to comply with the directions would not, doubtless, have affected the rights of the parties. In that case the parties would have done all they could have done to comply with the law" (p. 102); and although it was averred that the failure to file was by reason of the clerk's neglect, yet the decision noticed and rested upon an implication of knowledge of the want of filing and record, in which case the taking away is inexcusable, for he could have compelled the clerk to file and record them. *Henkel* v. *Heyman*, 91 Ill. 96, 102, 103.

So, in the other case of this partnership, the Court says: "It is doubtless true that after appellee had performed all the law required of him, he should not be prejudiced by the failure of a public officer to perform his official duty, provided no act of appellee's intervened causing or contributing to such failure." *Pfirmann* v. *Henkel*, 1 Bradw. (Ill. App.) 145.

But if these dicta are just and reasonable in themselves, nevertheless the language of that other section of the statute is perfectly unambiguous: "The partnership shall not be deemed to have begun until," etc. If the limited partnership has not been duly formed, there is either no partnership at all, or a general one, according as it has not or has been launched.

§ 36. **In what Book to record.** — The statutes generally specify that the record shall be in a book especially

kept for the purpose. An object of the record being public inspection, it is proper to forbid the record to be among the deeds and mortgages where no system for indexing such a paper is practicable, and where it would be virtually concealed. On the other hand, as a mercantile population is in many, perhaps most, counties sparse, and as the presentment for record of such paper may therefore be of very infrequent occurrence, perhaps not one in a dozen years, we may suppose that the volume for such record need not be exclusively devoted to limited partnerships, but it may also include other similar records.

A record in a book called the "Society and Partnership Book," which also contains incorporations, religious associations, and the like, was held sufficient in *Ulman* v. *Briggs*, 32 La. Ann. 657.

It was also held that after *prima facie* proof of record, as the recorder's certificate, that the document was duly recorded in vol. 118, p. 517, the burden was on the plaintiff who attacked its validity to show that the record was irregular. *Rayne* v. *Terrell*, 33 La. Ann. 812; *Ulman* v. *Briggs*, 32 La. Ann. 657; and cf. *Hampden Bank* v. *Morgan*, 2 Haz. U. S. Comm'l & Statis. Reg. 57.

§ 37. **Partnership begins when.** — The provision that "no such partnership shall be deemed to have been formed" until the proper steps are taken, does not mean that there is no partnership, but that it is not a limited one. If the partners have transacted any business after an attempted formation of a limited partnership, void as such for defects, the association that actually exists is not void or illegal, but is a general partnership. Of this there can be no doubt; but it has also been several times decided.

Thus, where steps to form a limited partnership were duly taken, but the business was the forbidden one of banking, the firm having begun business is a general one. *McGehee* v. *Powell*, 8 Ala. 611.

So where the certificate was not acknowledged, the parties, by transacting business, become general partners, *Fox* v. *Graham*, Michigan Nisi Prius Cases, 90; and the same was distinctly recognized as the law in *Gray* v. *Gibson*, 6 Mich. 300, and *Ward* v. *McIntosh*, 3 E. D. Smith, 221.

So where several persons brought a suit as a limited partnership, but the proof of such partnership failed because the capital had not been paid in cash, the action did not fail, for there was still a partnership, — a general one. *Rosenberg* v. *Block*, 50 N. Y. Superior Ct. 357.

And very many of the cases where the capital was not properly contributed, or the filing and recording were omitted, are in effect authorities to the same effect.

§ 38. **Branches in other Counties.** — The statute requires a transcript of the record of the certificate (the affidavit seems not thus required) to be recorded in every county where the partnership has a place of business. As the partnership is not deemed formed until a certificate is recorded, it would seem an open question whether the record at the locality of the chief place of business and the omission to record at a branch place constitutes a limited partnership as to persons dealing with it in the former place, or not at all. Taking the statute literally, that the partnership is not deemed formed until a certificate is, etc., there would seem to be a limited partnership. As to persons dealing at the branch house, the question is of no importance; for if a limited partnership was formed, the special partner is

liable generally for the non-observance of the statute, which results in the same thing as if the limited partnership is not deemed begun.

Whether the omission to file a transcript in the county where the firm has a branch business would make the members general partners as to contracts in all places, was queried but not decided in *Riper* v. *Poppenhausen*, 43 N. Y. 68, 73–4.

The question of what constitutes a place of business was considered in the following case in the District Court of the United States for Massachusetts in 1872, unfortunately not to be found except in a magazine: —

A firm manufacturing and dealing in boots, shoes, and leather, had a factory in Worcester County, where they made boots and shoes, and where the workmen, numbering about one hundred, were hired and discharged by an agent of the firm who was superintendent there, the money being sent him from Boston. The firm kept the books, except those relating to the manufacturing, and the pay-rolls were kept in Boston, and the stock was bought and the manufactured goods sold in Boston. The certificate was recorded and published only in the county where Boston is. The court said it should also have been recorded in Worcester County, for that was a place of business of the firm within the meaning of the statute, and the partners are all general partners. In re *Thayer* (U. S. D. C.), 7 Am. Law Review, 172.

§ 39. — **Removals.** — The act provides for registry of the certificate where the principal place of business is situated, and for a transcript of the certificate to be filed in other counties when there are other places of business. Branches of the business in different counties are therefore provided for, but a removal is left wholly unprovided for; so that if a firm discontinues business in one county and goes to another, the act

affords them no protection as special partners in this new locality. A publication for six weeks is required in the district where the business is carried on. A removal from the county where the firm was organized to another county without filing any certificate or making any publication, renders the partners general partners as to the business in the latter place. *Riper* v. *Poppenhausen*, 43 N. Y. 68. This point had been raised in the argument in *Richter* v. *Poppenhausen*, 42 N. Y. 373; 9 Abb. Pr. (N. S.) 263.

§ 40. **False Statement in Affidavit.** — If no affidavit is filed, the limited partnership is not "deemed to have been formed;" whereas if a false affidavit is filed, the partnership is formed, but the special partner is liable generally *in solido* for all engagements. There may be a difference as relates to third persons, in that "engagements" means contractual liabilities only, and not torts. There would also be a difference between no limited partnership at all and a limited partnership with loss of the protection of the statute, when a dissolution is desired before the end of the partnership term, as to the notices to be given to the public and former dealers.

This liability, consequent on falsehood in the affidavit, is not affected by the rule that two witnesses are necessary to prove perjury, *Madison County Bank* v. *Gould*, 5 Hill, 309, nor is it as a punishment for perjury, for it is the general partner who makes it; and besides, the falsity may have been unintentional, as it was in *Van Ingen* v. *Whitman*, 62 N. Y. 513. Thus one special partner must not only pay his own capital in actual cash, but must also see that the other special partners do the same; for otherwise the affidavit will be false and he

liable as a general partner, *Whittemore* v. *Macdonell*, 6 Up. Can. Q. B. 547.

The most common falsity of the affidavit or certificate is in a misstatement of the payment of the capital, and will be considered in the next chapter.

§ 41. **Publication.** — The requirement that the terms of the partnership shall be published for a certain number of weeks immediately after recording, doubtless refers to the number of weeks immediately after, and not to the days immediately after, recording. The usual construction is also placed on the duration and intervals of the publications. Thus, to publish for six weeks means hebdomadal, and not daily, insertions; nor does it require seven publications, but six only; also on the same day of the week, and in the same newspaper.

It was therefore held of a publication begun three days after the record that if begun at any time during the week it would have been sufficient, *Bowen* v. *Argall*, 24 Wend. 496; and cited in In re *King*, 5 Ben. 453, 455; s. c. 7 Bankr. Reg. 279, 281.

A publication once a week for six weeks is sufficient, although but thirty-six days intervene between the first and last. The statute counts by weeks, and each publication represents seven days; and thus these six make out the full term of forty-two days. *Bowen* v. *Argall*, 24 Wend. 496.

An interval of seven days must elapse between each successive publication; hence where in one of the required papers a publication of dissolution was correct, but in the other it was on January 11, 21, 27, and February 1 and 10, the statute has not been complied with, and all proceedings based on such publication must fail. Therefore a claim by the special partner as creditor was rejected in bankruptcy. In re *King*, 5 Ben. 453; s. c. 7 Bankr. Reg. 279.

Where during the currency of the publication the name of one of the newspapers in which publication was directed to be made was changed from "Buffalo Daily Despatch and Evening Post" to "Buffalo Evening Post," this was held not to affect the validity of the publication, for the identity of the paper was not lost by change of name merely, *Metropolitan National Bank* v. *Sirrett,* 97 N. Y. 320, 331; s. c. 15 Abb. New Cas. 318, 333.

The requirement to publish the terms of the partnership does not require a statement of all its details, but is satisfied by publishing the terms of the certificate (this was a publication of the renewal). *Metropolitan National Bank* v. *Sirrett,* 97 N. Y. 320, 331; s. c. 15 Abb. New Cas. 318, 332.

As to the consequences of a delay in publishing, see pp. 88-96.

§ 42. — **Errors in Publication.** — An error in the publication, though it be a mere typographical one, will be fatal if it amounts to a false statement or is misleading; but if besides being unintentional it is also harmless, it will be deemed immaterial. The question is whether the mistake is calculated to mislead.

Thus, where in one of two required newspapers the special partner's contribution was stated to be $5,000 instead of $2,000, as it actually was, although a mere mistake, yet this is not publishing the *terms* of the partnership, and the partners are bound at their peril and it is their duty to see that correct notices were published; and the creditor is not required to show that he was misled. Proof that he did not subscribe to that paper is immaterial, for it does not show that he was not misled, even if that could be essential. *Smith* v. *Argall,* 6 Hill, 479; affirmed in Court of Appeals as *Argall* v. *Smith,* 3 Denio, 435.

Had this error consisted in printing $2,000 where it should

have been $5,000, it might have been urged to be harmless, since the firm would have a greater credit than was apparent, instead of less, and its creditors would have been benefited rather than prejudiced. But, on the other hand, it is a false statement in a material matter, contrary to the positive statutory commands.

Printing a surname Argal*e* for Argal*l*, giving a slightly different sound, would be presumed immaterial until it was shown that some one was misled. *Bowen* v. *Argall*, 24 Wend. 496.

An unintentional mistake in the publication in stating that the partnership was to begin on November 16 instead of October 16, if it had no influence on the contract sued on, is immaterial; for as to such contract it was a substantial compliance with the statute. But the court said that had the error been intentional, or had the contract been made before the time stated as the beginning of the partnership, the defect would have been fatal. *Madison County Bank* v. *Gould*, 5 Hill, 309.

CHAPTER IV.

CONTRIBUTION OF THE SPECIAL PARTNERS.

§ 43. **Capital not required from General Partner.** — The statutes (§ 20 above) do not require any contribution to the capital from the general partner, and if he does give part, there is no requirement that this shall be mentioned in any of the proceedings,—except perhaps in Florida (§ 2), where "business experience" may be contributed, which necessarily relates to the general partner; for a use of experience by the special partner beyond advising would constitute an "interference." But even in Florida I apprehend that the only object of stating and the only consequence of silence as to such contribution is that it will or will not become a debt of the concern, in the nature that all capital is a debt.

§ 44. **Résumé of Statutes.** — The provisions of the statute relating to the special capital, except that relating to a change in the capital, which will be treated in the chapter on "Alteration," are,—That it be actually paid in — generally in cash, but in some States in property, or in both — before the certificate is made; that the certificate state the amount contributed by each special partner, with other particulars if it consists in any part in other property; that the affidavit in States requiring one, aver its payment; that any false statement in certificate or affidavit creates general liability;

and that the publication state the amount of special capital of each.

These requirements are among the strictest in the law of limited partnership, for they alone enable the public to estimate correctly and from official information the credit that can be safely given to the firm. They are therefore the essential precautions of the law, an observance of which no honesty of purpose or accidental mistake will excuse.

§ 45. **General Rule.** — The general principle as to payment may be stated thus: The fund must be in existence in money and in the sole control of the general partner on the day the partnership is formed, free from all contingencies except those arising from the proper business of the concern.

The foregoing will be divided or re-stated in several rules, with the authorities from which it is deduced under each.

§ 46. I. **Must be unconditional.** — The payment to the general partner must be unqualified; that is, unrestricted by any condition as to its use or reservation of a control by the special partner.

Where by the articles of partnership a son of the special partner was to be employed by the firm, and the general partner was to sign no note or check without the son's approval, this was held not only to be a violation of the statute as to interferences, but that the money was not actually paid in for the special partner, though the clerk retained his grasp upon it. *Richardson* v. *Hogg*, 38 Pa. St. 153.

The limited partnership of Sirrett & Stafford, composed of

Lucian A. Sirrett and Robert Stafford, with W. B. Sirrett as special partner, was sued on two notes. W. B. Sirrett, who alone defended, claimed his limited liability, and that he had contributed $40,000 in cash to the capital. It appeared that W. B. Sirrett had been in business prior to the partnership as W. B. Sirrett & Co., and desiring to convert his business into a limited partnership, had an understanding, but no contract, with the other defendants that the limited partnership would be formed and that it would buy his stock of goods. On December 28 he gave Sirrett and Stafford his certified check for $40,000, which was deposited by them and credited to their bank account; the certificate was then made, and the affidavit stating that the capital had been actually and in good faith paid in cash. Held, that as the check was deposited and credited to the firm's account before the affidavit was made, the affidavit was true.

The old stock was transferred as follows: W. B. Sirrett procured one Stillman to buy the stock at $33,164.08; and to enable Stillman to buy it, gave him his certified check, which Stillman deposited and drew against in favor of the old firm, and took a bill of sale of the stock. W. B. Sirrett received and deposited this check, and gave the new firm his own check for the $40,000. Two days afterwards Sirrett & Stafford bought the stock of Stillman, who had not removed it, giving him their check for $33,164.08, drawn against the account made by the deposit of W. B. Sirrett's check. Stillman drew against the check and paid W. B. Sirrett in payment of the original loan. It was held that although it was the expectation that Sirrett & Stafford would buy the former stock and pay for it out of W. B. Sirrett's contribution, yet, not being a binding contract limiting the general partners' control, which they could not repudiate, the question of intent and good faith was properly submitted to the jury, and the transaction was not, as matter of law, a fraud on the statute. They found the motives

were honest, the stock was needed by the new firm, and the price was fair and reasonable; and the transaction, not being in consummation of a prior binding contract, was in effect a transaction after the firm was organized. *Metropolitan National Bank* v. *Sirrett*, 97 N. Y. 320; s. c. 15 Abb. New Cas. 318.

§ 47. II. **Must be Cash before Certificate filed.** — The payment must be made to and in the hands of the general partner before the certificate is filed, in actual cash. Neither check, nor promise, nor subsequent payment will suffice, for the certificate and affidavit are required to recite what has been done, and not what is executory.

Where the certificate was filed on December 23 and stated that the partnership would begin on January 1st, and on December 31st Abendroth, the special partner, handed in his check for the amount of his capital, which was duly paid on January 2d, the 1st of January being Sunday, it was held that Abendroth was liable as a general partner, for the statement in the certificate and affidavit was false; and this though it was done in good faith and no one was injured. *Durant* v. *Abendroth*, 69 N. Y. 148 (25 Am. Rep. 158), affirming s. c. 41 N. Y. Superior Ct. 53, and recognized as law in *Durant* v. *Abendroth*, 97 N. Y. 132, 138.

A check is a mere obligation or order, and many contingencies might occur to prevent its ever being paid. A person giving a mere check cannot be said to have paid the money; he could have drawn out the money and countermanded the check in the interim. The money might as well have been in his pocket, and was so in contemplation of law. *Durant* v. *Abendroth*, 69 N. Y. 148, 153, 154 (25 Am. Rep. 158).

Nothing but cash satisfies the requirement of the statute. No engagement or security, however good, can be substituted even temporarily. *Ib.* 153.

The court says, however, that had the money been paid to the bank to the credit of the general partners, or deposited with a third party for the express purpose of being paid to the firm, or so appropriated to that purpose as to be irrevocably beyond the control of the special partner, or had the check been certified, the argument that the money had been actually paid would have had much force. *Ib.* 153–4.

This case was followed in 1879 by another, where the special partner gave an uncertified check on a bank at which he then had not sufficient funds to meet it, but provided funds on the next day before presentation of the check, and it was duly paid. He lost the protection of the statute, for the affidavit was false in stating that he had paid in cash. *Maginn* v. *Lawrence*, 45 N. Y. Superior Ct. 235.

In *Hogg* v. *Orgill* the Supreme Court of Pennsylvania, construing the New York statute, decided that a payment by the special partner of his contribution by giving in the checks of third persons, which checks represented cash, and the amount actually went into the firm business, did not violate the requirement of actual cash where the checks were not given as a mode of substituting credit for cash, but merely as the usual mercantile mode of payment; but the report of the case does not show but that the general partner may have had the checks credited on his account and actually received the money before he made the affidavit and certificate. *Hogg* v. *Orgill*, 34 Pa. St. 344.

It is also held by the same court (Pennsylvania) that the special partner's check was an equivalent to paying in cash where the bank had no claim against the special partner and the check was drawn *bona fide* against an actual credit in the bank. *Seibert* v. *Bakewell*, 87 Pa. St. 506.

In Louisiana, where immediate payment is not essential, it was held that where no time for payment is stipulated, interest thereon runs against the partner *in commendam* only from the time of due demand. *De Lizardi* v. *Gossett*, 1 La. Ann. 138.

It is obvious that all objections to the special partner's paying with his own check will apply with multiplied force to his payment with the checks of others; for it is no more cash in one case than in the other, and it introduces the uncertainties of a third person's life, solvency, or caprice. It follows that the above Pennsylvania decisions state a doctrine not reconcilable with that maintained elsewhere.

§ 48. III. **What is and is not Cash.** — The payment of his capital by the special partner must be in actual cash; neither property nor bonds, securities, debts, or promises will suffice, except in certain States permitting property contributions.

The foregoing authorities, holding that checks, though collected by the general partner after the commencement of the firm, and used in its business, do not constitute a payment before the partnership has been formed, also sustain the above rule. In addition are the following authorities, where the question of delay of payment did not arise, but the kind of payment was the objection.

Where the special partner gave in as part of his contribution an order for United States bonds, payable to bearer, at that time deposited specially in a bank and worth more than par, and the firm used and realized from them more than the necessary amount in cash, this is not a sufficient payment of cash, for two reasons, — First, no mercantile usage can allow the substitution of equivalents or securities short of cash. The statute was intended to exclude this possibility, that the temptation to evade its requirements may be removed. Second, even if United States bonds are equivalent to cash, yet the delivery here was

not so complete as to be valid against any individual creditors the special partner might have, for the title in the bonds remained in him until notice to the depositary of the transfer, and he was held to be liable as a general partner to the creditors. *Haggerty* v. *Foster*, 103 Mass. 17.

Where the general partner was before the formation of the firm indebted to the special partner — they having been general partners — in the sum of £750, for which the special partner held his notes, and on the formation of the limited partnership, in which the special partner's capital was to be £750, the latter paid it by surrendering his notes to the general partner: this was held no payment, and both were liable as general partners. *Benedict* v. *Van Allen*, 17 Up. Can. Q. B. 234.

So delivering promissory notes or acceptances to the firm, whether they are the notes of the special partner or of a third person, are obviously not cash, but mere agreements to pay cash, and the special partner is liable as a general one for the double reason; viz., that he has not paid cash, and that the affidavit stating that he has done so is false. *Pierce* v. *Bryant*, 5 Allen, 91; *Whittemore* v. *Macdonell*, 6 Up. Can. C. P. 547; *Watts* v. *Taft*, 16 Up. Can. Q. B. 256; *Patterson* v. *Holland*, 7 Grant's Chy. (Up. Can.) 1; s. c. 6 *ib.* 414.

Contributing in part or wholly in a stock of goods of course is not a compliance with the requirement to pay cash. *Richardson* v. *Hogg*, 38 Pa. St. 153; *Bement* v. *Philadelphia Impact Brick Machine Co., Limited*, 12 Phila. 494; s. c. 5 Weekly Notes, 58; *Haviland* v. *Chace*, 39 Barb. 283; *Van Ingen* v. *Whitman*, 62 N. Y. 513; In re *Thayer*, 7 Am. Law Rev. 177, particularly stated on p. 65, below.

§ 49. IV. **Each responsible for Others.** — Each special partner, where there are more than one, must see that the other special partners have paid in their capital in cash, — at least in States which require an affidavit, —

or provide that the certificate shall state the fact of payment; for otherwise the affidavit and certificate will contain a false statement. *Whittemore* v. *Macdonell*, 6 Up. Can. C. P. 547.

"It was argued that it would be extremely hard upon those who signed their names first as special partners and paid their money, to hold that they became general partners through the misconduct of subsequent partners who signed, but did not pay. But the language of the act is plain; it imposes in this respect a duty on each party signing to see that before the certificate is recorded it contains no false statement." *Ib.* 553.

§ 50. V. **Imperative Nature of the Requirement.** — Good faith, or honest intentions, or accident in failing to observe the above rules will not avail to prevent the consequences; the commands of the statute are positive.

Authorities to this effect in relation to the steps to be taken in the formation of the partnership will be found above (pp. 43–54). The following are the authorities peculiarly in point.

As protection to the public is one reason why strict compliance with the statute is required, it follows that the fact that the non-compliance was in good faith is wholly immaterial. Parties are bound to know the truth. In the following cases the court specifically stated this; viz., that honest intention and understanding that the contribution was properly made are not sufficient: *Haggerty* v. *Foster*, 103 Mass. 17, 19; *Durant* v. *Abendroth*, 69 N. Y. 148, 152; s. c. 25 Am. Rep. 158; *Whittemore* v. *Macdonell*, 6 Up. Can. C. P. 547; *Pierce* v. *Bryant*, 5 Allen, 91.

Where the special partner told the general partner to sell

a stock of goods belonging to the former, and put the proceeds into the firm as the cash contribution, and the general partner told him this had been done, he is nevertheless liable as a general partner. "The statute is thwarted, the public is misled, and its reliance is misplaced and deceived as much when there is an unintentional untruth as when there is an intentional one. This statute does not set out to deal in motives, but with acts and their results; and it guards the public, not by requiring good intentions, but by a certain act done in a certain mode, and a true statement that it has been done thus." *Van Ingen* v. *Whitman*, 62 N. Y. 513, 520.

Consequently, where the special partner contributed $2,000, and correctly stated this in his affidavit, but in the newspaper publication it was by mistake stated to be $5,000, he was held to be a general partner; for he is bound at his peril to see that correct notices are published. So, although the creditor was not a reader of that particular paper; he may have been misled, nevertheless. *Smith* v. *Argall*, 6 Hill, 479; affirmed in Court of Appeals, *Argall* v. *Smith*, 3 Denio, 435; s. p. noticed but not passed on in a case involving the same partnership, *Bowen* v. *Argall*, 24 Wend. 496, 504.

§ 51. **Creditor need not show Injury.** — A creditor need not show that he has been injured by the non-compliance relied on to render the special partner liable *in solido;* violation of the express commands of the statute is sufficient, — First, because such is the positive language of the statute; and Second, because the burden of obtaining evidence of so doubtful and speculative a proposition as that he gave credit to the firm in consequence of the supposed actual cash payment will not be imposed upon him. *Pierce* v. *Bryant*, 5 Allen, 91; *Durant* v. *Abendroth*, 69 N. Y. 148; s. c. 25 Am. Rep. 158; *Holliday* v.

Union Bag and Paper Co., 3 Col. 342; In re *Thayer* (U. S. Dist. Ct. 1872), 7 Am. Law Rev. 177; and see *Smith* v. *Argall*, *supra*.

§ 52. **Special Partner may obtain his Capital from Others, if not a Contrivance.** — The special partner need not use his own funds, but may borrow his capital, provided it is not obtained by a contrivance to evade the statute, and he does not deplete the firm's assets in the method of his borrowing. The means used by him to obtain the money are of no consequence, provided it is an absolute payment, and he has done his duty in handing the money to the general partner, irrespective of a misuse of it by the latter.

In *Metropolitan National Bank* v. *Sirrett*, 97 N. Y. 320, 330; s. c. 15 Abb. New Cas. 318, 331, the special partner was county treasurer, and temporarily borrowed or took the money held by him as such to make his contribution, the county not complaining; and this was held not to be material to his being a special partner.

On the expiration of a general partnership, the general partner gave the special partner the check of the firm for $20,000 as his interest in the concern, the firm having but $4,000 in the bank, though the bank had agreed with the general partner to cash the check. The special partner deposited the check to his own account in the same bank. The parties having formed a new limited partnership, the special partner gave his check for $20,000 to the general partner, and the latter handed the check to the bank, but without the special partner's knowledge the bank credited the check to its account against the old firm without crediting the money to the new firm or to the general partner. It was argued that the

payment was merely formal and not *bona fide*, and the certificate therefore false; also that the special partner must see that the contribution actually goes into the stock of the firm. But the court held that it was *bona fide*, for the bank had no right to make such appropriation of the check to an individual debt. *Seibert* v. *Bakewell*, 87 Pa. St. 506.

A limited partnership having expired January 1, having $9,000 assets above liabilities, and owing F, the special partner, that sum for his capital, the parties, on January 16, formed a new limited partnership, certifying it as from January 2, and that F, the special partner, had contributed $25,000 in cash as his capital, the publication beginning January 17. It had been contributed in this way. On January 14 the general partners transferred to him boots and shoes worth about $9,000, and F's attorney paid them $9,000 in cash out of his own money; on January 16 the attorney gave them $8,000 more, and on the 16th F gave them his check for $8,000, which the bank paid on the 17th. The attorney received as security from F checks for the $17,000 he had paid. On the 17th, the firm repaid to the attorney the $9,000 paid by him on the 14th, — on which he reconveyed to them the boots and shoes, — and also paid him $8,000, to be paid to F on account of a debt of $10,000 due F from the old firm for money lent. The attorney was thus repaid his $17,000, and returned to F his checks, F indorsing the $8,000 as a credit on the $10,000 debt. F's checks to the attorney were not represented by money in the bank where they were drawn, but the bank would have honored them if presented. The court held that the whole transaction from the 14th to the 17th was but one transaction; that F had not contributed $25,000 in cash, but $9,000 in boots and shoes, $8,000 cash, and $8,000 in a credit on an old debt; and that as money's worth was not equivalent to money, F was a general partner, although there was no intention not to comply with the statute. In re *Thayer* (U. S. D. C. 1872), 7 Am. Law Rev. 177.

So where Merrifield, a business man, with a view to becoming a special partner of McDowell, sells out his business and goods to McDowell for $5,000 actual cash, though the goods were worth but fifty to seventy-five per cent of the price, and the parties then form a limited partnership, Merrifield contributing his $5,000 in cash, and McDowell agreeing to contribute $5,000 in merchandise, and actually contributing part of that which he had purchased from Merrifield at such inflated price, — the facts were regarded by the court as not sufficient to sustain a verdict finding that the sale was a contrivance. *Lawrence* v. *Merrifield*, 42 N. Y. Superior Ct. 36; affirmed without comment in 73 N. Y. 590.

But where the limited partnership began business by taking all the assets of a former concern and assuming all its liabilities, the special partner having first procured part of his contribution by borrowing the amount from such firm, though the case did not turn on this point, yet this was regarded as not supported by the above case of *Lawrence* v. *Merrifield*, and not a compliance either with the spirit or the letter of the statute, since it depleted the assets of the former concern and substituted for the amount the special partner's promise to pay in the future. *Maginn* v. *Lawrence*, 45 N. Y. Superior Ct. 235, 239. Cf. also *Benedict* v. *Van Allen*, 17 Up. Can. Q. B. 234, cited above, on p. 61.

Where one Marks, the special partner, instead of borrowing his capital procured it, not as a loan, but under a private agreement that Bramhall, the lender, should be the owner of two-fifths of the special partner's capital and profits, with a privilege of examining into the firm's affairs from time to time, one general partner assenting, this was held to make both Marks and Bramhall general partners, — Bramhall, because it was an attempt to evade the statute by giving him the rights of a special partner, and Marks, because of the false statement that he had furnished a certain quota of capital, whereas he had

furnished but three fifths of it (New York Common Pleas, General Term, 1863). *Buckley* v. *Bramhall*, 24 How. Pr. 455; s. c. *sub nom. Bulkley* v. *Marks*, 15 Abb. Pr. 454.

§ 53. In order to estimate the true value of this case outside of New York it must be read in the light of the law of general partnerships as it is to-day or is rapidly becoming; viz., that the old doctrine that receiving part of the profits constitutes a person — disregarding certain exceptions —, a partner, has been thoroughly exploded in England by the cases of *Cox* v. *Hickman*, 8 H. L. Cas. 268; *Mollwo, March, & Co.* v. *The Court of Wards*, L. R. 4 P. C. 419, and the series of cases following them, and that the present English rule as deduced from these cases has been applauded and adopted in this country wherever it was not already the rule, perhaps every time occasion has arisen, notably and expressly so in New Hampshire, Rhode Island, Ohio, Arkansas, Michigan, Montana Territory, Pennsylvania,[1] and New York. The New York courts were greatly hampered by their own early decisions, running through Wendell's and Johnson's Reports, and going the full length of *Waugh* v. *Carver*, 1 Sm. Lead. Cas. 968; but it would appear from *Burnett* v. *Snyder*, 81 N. Y. 550, and *Cassidy* v. *Hall*, 97 N. Y. 159, that they had at last shaken off the evil influence. Now in the above case Bramhall may be a sub-partner of Marks rather than his secured creditor, — not, however, because he shared part of the profits, but

[1] *Eastman* v. *Clark*, 53 N. H. 276; *Boston, &c. Smelting Co.* v. *Smith*, 13 R. I. 27; *Harvey* v. *Childs*, 28 Ohio St. 319; *Culley* v. *Edwards*, 44 Ark. 423; *Beecher* v. *Bush*, 45 Mich. 188; *Parchen* v. *Anderson*, 5 Montana, 438; *Hart* v. *Kelley*, 83 Pa. St. 286; see also *Smith* v. *Knight*, 71 Ill. 148.

because he was absolute owner of part of Marks's interest. If it be true that Bramhall should be liable as for an evasion of the statute without an interest in the firm by the consent of all the partners, and without being held out as partner, on what principle is Marks liable? If it be because of a false statement, as said by the court, then what would be the consequence had the arrangement been made after the affidavit was made? Compare *Burnett* v. *Snyder*, 81 N. Y. 550; s. c. 76 N. Y. 344.

§ 54. **Contribution in Property.**—In those States where the contribution of the special partner may be in either money or property, or both, the requirements as to valuation of the property and a statement of the facts in the certificate must be observed, and the certificate must so state, with the exact respective amounts of each kind of contribution.

Thus, in Pennsylvania, the act of March 30, 1865, and subsequent acts permit this, but require the property to be at a valuation approved by all the partners, and the certificate to state the facts. Under these laws it was held that where the certificate alleged a contribution of $3,000, and in fact the partner had put in $645 in cash and the rest in merchandise, he was liable as a general partner, for the certificate did not state the facts. *Vandike* v. *Rosskam*, 67 Pa. St. 330.

So, where the amount in money or property at cash value is required to be stated, and the affidavit was "has contributed $12,000," this statement was held to import $12,000 in cash; and as part of the amount was in property, the affidavit contained a false statement, and the special partner was liable as a general one. *Holliday* v. *Union Bag and Paper Co.*, 3 Col. 342.

The court said the public should be enabled to estimate correctly the credit to be given to the firm, adding, "it was the

evident intention of the legislature to prevent parties putting in property of uncertain and estimated value and calling it cash, thus obtaining a credit to which their capital would not entitle them." "To allow him [the special partner] to publish to the world that he had contributed $12,000 cash would invite and encourage fraudulent practices." *Holliday* v. *Union Bag and Paper Co.*, 3 Col. 345, 346.

And where the statute required a description and valuation of the property to appear in the certificate, a list thus, "a contract with the P. Gas Light Co., at a valuation of $2,500," and "furniture, fixtures, and all the tools and chattels now on the premises No. 209 L Avenue, in the City of S.," at a valuation of $12,500, was held too general to enable any one to form a correct estimate of the property; and the lumping valuation renders it equally difficult to estimate values, the object of the act being to enable creditors to judge precisely of what the property consisted, and its worth. *Maloney* v. *Bruce*, 94 Pa. St. 249; s. c. 9 Weekly Notes, 92.

So a certificate under the New York statute stating that L, the special partner, had contributed $1,000 in cash and "about $8,000 of effects and property, the exact amount of which is yet to be ascertained," was held not a compliance with the statute; for the requirement that the amount be stated, means the exact amount (U. S. C. C. 1874). In re *Merrill*, 12 Blatchf. 221; s. c. 13 Bankr. Reg. 91.

Where a special partner contributed interests in a patent right, and a later act (Act of April 22, 1876, Purdon, 2028) allowed contributions to be made in property, which act the association might have availed itself of by compliance therewith; yet not having done so, the mere passage of the act without affirmative action under it by the association will not avail the partners to cure the original falsity of the affidavit. *Bement* v. *Philadelphia Impact Brick Machine Co. Limited*, 12 Phila. 494; s. c. 5 Weekly Notes, 58.

CHAPTER V.

THE PARTNERSHIP NAME AND SIGN.

§ 55. **Statutes.** — "The business of the partnership shall ["may" in Dist. Col. § 504; Md. § 11; Wash. Ty. § 2375] be conducted under a firm in which the names of the general partners only shall be inserted, without the addition of the word 'Company' or any other general ["equivalent" in Kentucky and Missouri] term; and if the name of any special partner shall be used in such firm with his privity, he shall be deemed a general partner."

Ala. § 2076.	Ark. § 4361.	Ga. § 1932.
Iowa, § 2159.	Kan. § 3360.	Ky. § 7.
Me. § 6.	Mich. § 2354.	Miss. § 1013.
Mo. § 3407.	N. C. § 3100.	N. J. § 13.
Oregon, § 6.	S. C. § 1315.	Tenn. § 1746.
Tex. § 3454.	Va. § 7.	Vt. § 3695.
Wash. Ty. § 2375.	W. Va. § 7.	

The same, but "with or without the word 'Company,'" — Dist. Col. §§ 504, 506; Md. §§ 11, 12.

The same, wholly omitting the words "without the word 'Company,' or any other general term," in Col. § 2523; Del. § 4; Mon. Ty. § 948; Nev. § 474.

Same for Fla. §§ 2, 9, with word "limited" added to all firm signatures in transactions.

It is the same, omitting the provision as to the word "Company," and also omitting "with his privity," *i. e.* the last clause reads, "if the name of any special partner shall be used in such firm, he shall be deemed a general partner," — Ill. § 16; Ind. § 6039; Neb. § 13; R. I. § 8; Utah Ty. § 13.

CONN. § 3, shall be in a company name, in which the name of one or more of the general partners shall appear; and if a special partner's name is used, he shall be liable as a general partner.

UP. CAN. § 10, follows the above form, except as follows, — "names of the general partners, or some or one of them, shall only be used," and omits all reference to the word "Company," or other term; but the form of certificate appended to the statute gives "& Co." as part of the name. See Appendix.

The whole of the above section is used, with the addition that if there are more than three general partners, all the names need not be used: KY. § 7; MASS. § 3; MO. § 3407; VT. § 3695; and in MICHIGAN, some or all the general partners' names.

The whole of the above section, except that if there are two or more general partners, the name or surname of one or more, with or without "and Company," or "& Co.," may be used in MINN. § 13; N. Y. § 13; WIS. § 1713; and cf. PA. §§ 34, 35.

Same, but if there are more than two general partners, the name of one or more with "& Co." may be used; otherwise all the names of the general partners shall be used: OHIO, § 3150.

OHIO also provides that "a firm of general partners who have transacted business under one firm name for more than five years may organize a special partnership to continue the same business, containing the same or any additional partner or partners, and adopt the firm name before used," subject to the provision as to putting up a sign: OHIO, § 3150.

A provision is also added that if the surname of a special partner is the same as that of a general partner, its use shall not subject the special partner to such liability in MASS. § 3, and PA. § 35.

There is no provision as to the style in CALIFORNIA, DAKOTA TERRITORY, NEW HAMPSHIRE, and WYOMING TERRITORY, further than in N. H. § 6, that if the name of any special part-

ner is used with his consent or privity, he shall be deemed a general partner; and in CAL. § 7510, and WY. TY. § 25, the name of a special partner shall not be used unless accompanied with the word "limited;" *i. e.* the consent of the special partner is not mentioned.

The business must be in a name consisting of the names or surnames of one or more of the general partners only, with or without "& Co.": DAK. TY. § 1458.

I presume that this — at least in New York, where § 363 of the penal code forbids the use of "& Co." in any partnership unless it represents an actual partner — would not allow the names of both of two general partners with "& Co." where there are no other general partners; and it was so decided for Pennsylvania. *Metropolitan National Bank* v. *Gruber*, 14 Weekly Notes, 12.

In New York Laws, 1881, p. 585, a limited partnership may use the name of a former general or limited partnership, a majority of the members of the former firm, or their survivors, properly consenting, and the fact being advertised.

§ 56. **Sign.** — "The said partnership shall put up upon some conspicuous place on the outside, and in front of the building in which it has its chief place of business, some sign, on which shall be painted in legible English characters all the names in full of all the members of said partnership, stating who are general and who are special partners."

DAK. TY. § 1458.	MINN. § 13.	N. Y. § 13.
PA. § 34.	WIS. § 1713.	

And in KY. § 13, and MO. § 3413, the special partners shall be liable as general partners unless the firm keeps up at its places of business a plain and legible sign, giving the style of the firm, with the words "limited partners."

In DAKOTA TERRITORY, MINNESOTA, PENNSYLVANIA, and

WISCONSIN, no penalty or liability for violation as to sign is specifically stated.

In OHIO, § 3150, the sign described in the above terms is required to contain the names in full of all the general partners, in default of which no action shall abate for failure to prove the names and numbers of the members.

In N. Y. § 13, the only consequence stated of an omission of the sign is that in default thereof no action shall be abated or dismissed by reason of failure to prove allegations of names or number of partners.

§ 57. **Name is more than a Symbol.** — The partnership name or style, frequently called the "firm," is in all partnerships, general or limited, the agreed sign representing and including the individual names or members, as if each was separately given, whether adopted by agreement or usage, or used without either prior agreement or usage. In this use of the name, and in ownership of it as a property right, limited and general partnerships stand on common ground.

In general partnerships the name is also a symbol to show that the transaction in relation to which it is used or the instrument to which it is affixed is a partnership act; for the presence of the separate individual names does not necessarily show this unless an intention to do a partnership act is also present, either expressly or by implication from the nature of the act.

For this use a partnership name is not, in general partnerships, necessary to exist;[1] nor if the name exists, is it by any means inexorably necessary to use it.

[1] See, for example, *Getchell* v. *Foster*, 106 Mass. 42, 47; *Kitner* v. *Whitlock*, 88 Ill. 513; *Haskins* v. *D'Este*, 133 Mass. 356; *LeRoy* v. *Johnson*, 2 Pet. 186, 198; *Ontario Bank* v. *Hennessey*, 48 N. Y. 545; *Parsley* v. *Ramsey*, 31 Ga. 403.

In limited partnerships the name is far more than a mere convenient symbol, it is a stringent necessity. The requirements for its adoption, record, publication, use, and permanence show the name to be an essential and organic element in the formation, action, and continued existence of the body. The certificate of formation requires the name under which its business is to be done to be stated, and this certificate is to be recorded and it or its substance published in the localities of principal or branch offices. These requirements alone would show that the use of the name is necessary to do partnership acts, and that it cannot be changed; for otherwise the design of adoption and publicity would be defeated. Nevertheless, most of the statutes further affirmatively say that the business shall or must be done under a name, etc., as above shown, and that any alteration of the name shall dissolve the partnership, and with it the continued protection of the statute, as will be shown. (See § 96.)

§ 58. **Object of the Provision.** — The purpose of this anxious care to record and announce the character and name of the partnership obviously is that persons giving credit shall be warned that part at least of the means of the firm is derived from members not liable beyond the fund, — "to force notice of the limited liability on those dealing with the company," Coleridge, J., in *Penrose* v. *Martyr*, E. B. & E. 499, 503; hence the suppression of the limited partner's name in the title, since it might lend a false credit and thus deceive. Hence also the prohibition of "& Co.," — an especially appropriate prohibition where the title must contain the names of all

the general partners, for it would then represent other partners without personal liability.

§ 59. **Consequences of Violation. — Use of "& Co." —** The statute as above set forth seems to affix no penalty or consequences to the use of "& Co." in the name; but when we reflect that as the use of such general term is forbidden, its presence would indicate a general partnership to those giving it credit, and therefore mislead them, unless the special partners are held to the liability indicated by such appearance, therefore liability *in solido* for all debts, the same as a general partner, follows such unauthorized name, even where the statute does not expressly so state.

This was directly held in Pennsylvania under the Act of 1836, § 13 of which was the same as that above given; the court deciding that although the section was obscurely worded, the penalty of general liability seeming to be confined to the use of the name of the special partner, yet this construction would allow the former part of the act to be violated with impunity, and consequently the penalty was intended to refer to all that precedes, and that therefore the use of the name of H. W. Andrews & Co. with the assent of the special partner made him liable as a general partner, although there was another general partner to whom "& Co." could apply. *Andrews* v. *Schott*, 10 Pa. St. 47.

The same point was suggested, but not passed on, in *Bradbury* v. *Smith*, 21 Me. 117, 121. Such was stated as the probable effect, although the statute did not expressly state the consequences, but that the use of the word "Company" should be shown to be intentional on the part of the special partner in *Ward* v. *Newell*, 42 Barb. 482; s. c. 28 How. Pr. 102; but in that case the special partner was suing on notes

made to him by the general partners, and the point therefore did not strictly arise.

A statute allowing, where there are two or more general partners, the name of one or more with "& Co." to be used, does not allow "& Co." to be used unless it represents at least one general partner not named in the style. Therefore where G and H as general partners, and M as special partner, adopted the name of G, H & Co., M was held liable as general partner; for the words "& Co." would mislead and give a false credit, if only a special partner appears under them. *Metropolitan National Bank* v. *Gruber*, 14 Weekly Notes, 12; followed, but with the remark that it appeared rather strict, in *Gibb* v. *Mershon*, 14 Weekly Notes, 89.

In *Hampden Bank* v. *Morgan*, 2 Haz. Comm'l & Statis. Reg. 57, the jury was charged that the addition of the words "and Company" to the name rendered the special partner liable as a general one.

And where the word "limited" was required to be used as part of the name, its omission on commercial paper (as here, a bill drawn for the Company not using the word "limited" was accepted; thus "accepted, J. M., Sec. for the Company") renders all those signing or authorizing such signature liable for the amount. *Penrose* v. *Martyr*, E. B. & E. 499; *German* v. *Moodie*, 9 Weekly Notes, 221.

That the special partner has his own business in the same building with the partnership, and own sign out, is of no importance whatever. *Marshall* v. *Lambeth*, 7 Rob. (La.) 471.

§ 60. **Equivalent general Words.** — By the phrase "& Co." or other general term is meant to prohibit such names as Geo. Russell & Brother, as in *Madison County Bank* v. *Gould*, 5 Hill, 309, though no notice was taken in that case of the point; or Bullock's Sons, as in *Vilas Bank* v. *Bullock*, 10 Phila. 309; s. c. 1 Weekly Notes, 219.

§ 61. **Must all the Names be used?** — That the "names of the general partners only shall be inserted" would not seem to require the insertion of all their names in the title, but only that the adopted title must avoid other names than those of general partners, and must avoid collective designations, such as "& Co."; for as there is no restriction on the number of the general partners, in many cases a composite title containing all their names would be impracticable. Moreover, the object of the statute, — to avoid misleading the public and sailing under false colors, — is not violated by omissions of names, and no one is injured by the absence of a name, for a less rather than a greater credit results therefrom. Such construction was impliedly adopted in New York at a time when its statute read as the section above, though the point was not noticed where a firm in which Geo. and Wm. Russell were the general partners, and C. D. Gould the special partner, was organized as George Russell & Bro., in *Madison County Bank* v. *Gould*, 5 Hill, 309.

A little doubt is perhaps thrown on this by a decision of the Philadelphia Common Pleas in 1875, where four brothers formed a firm, — two as general and two as special partners, — in which the court stated that "the evident awkwardness of these long firm names" caused the acts of 1865 and 1868 (the acts now in force), allowing the name of one general partner with "& Co." to be used with a sign containing all the names, and that this abandoned the idea that the firm name is to be the test as to who are the general partners, the sign taking its place for that purpose; and therefore, as Bullock & Co. would have been a correct name, that of Bullock & Sons

is not more indefinite and equally good. *Vilas Bank* v. *Bullock*, 10 Phila. 309; s. c. 1 Weekly Notes, 219.

§ 62. **Sign; Consequences of Omission.** — The Pennsylvania Act does not state the consequences of an incorrect sign; but its Supreme Court said that if there was no proof that the special partner's name was painted on the sign, he must be held to be a general partner. *Vandike* v. *Rosskam*, 67 Pa. St. 330, 333.

§ 63. **Creditor's Knowledge.** — Whether the creditor's actual knowledge that the partnership is a limited one will prevent his resort to the general liability, being a consideration that applies to all kinds of non-compliance with the statute, will be treated by itself. (See next chapter.)

CHAPTER VI.

SCOPE OF BUSINESS AND RELATIONS OF THE PARTNERS.

§ 64. To ascertain more fully the consequences to the special partner of a defective attempt to form a limited partnership or of the formation of one for an unauthorized purpose, will require an examination,—First, of the scope of the business; Second, of the relation that a special partner bears to the firm; Third, certain parts of the law of general partnerships.

SCOPE OF THE BUSINESS.

§ 65. **Scope limited by Statute.**—The statutes in most of the States restrict the purposes for which a limited partnership is allowed to mercantile, mechanical, and manufacturing, many add mining, and some agricultural, while a few allow any lawful business; but nearly all expressly forbid it for banking or effecting insurance.

If a limited partnership is formed for a purpose not authorized or actually forbidden by the statute, and the business is launched, the partnership is not an illegal body, its contracts are all valid; yet it is not a limited, but a general partnership.

Thus if a firm were formed for the purpose of transacting business in another State it would be a general partnership in both States; for most of the statutes say that the partnership may be formed for the purpose of

doing certain business in "this State," Territory, or District, and "within Upper Canada." This must not be understood to mean that the partnership cannot have dealings outside of the State; as to which, see the next chapter, on the Conflict of Laws.

Where a limited partnership was formed for a banking business, it was held to be a general partnership, and all the partners liable *in solido*, in *McGehee* v. *Powell*, 8 Ala. 611.

§ 66. Whether a limited partnership as agents for insurance companies would be included in the exception, may well be doubted. It is not within the reason of the exception; but the exception as to insurance differs in different statutes. Thus the phrases "effecting insurance," "making insurance," "insurance purposes," and "insurance business" all occur, and such an agency is rather mercantile than insurance. The phrase "mercantile business" is very ambiguous, and has been considered in but one case, where it was said that the exception of banking and insurance showed that the word "mercantile" was used in a very comprehensive sense, and it was held to cover the business of buying and building steamboats and employing them in transportation of passengers and merchandise. *Bowes* v. *Holland*, 14 Up. Can. Q. B. 316.

§ 67. **Scope limited by Nature of Business.** — The general principles of the power of a partner in the case of a general partnership may be stated thus, — First, his power is at least as extensive as the articles of partnership make it. Second, a general usage of the firm, acqui-

esced in by all the partners, may make it more extensive, being equivalent to an agreed enlargement of the articles. Third, it is impliedly as extensive as is reasonably necessary for the successful conduct of the business in the ordinary way, or measured by the nature of the business according to the usual and ordinary course in which it is carried on by those engaged in a similar business in the same locality.[1] Fourth, this latter measure of power, which only applies as between the firm and third persons, is not as to them affected by the secret restrictions of the partnership articles, of which they have had no notice.

§ 68. The above rules apply to limited partnerships.

Thus where a special partnership was formed to do a commission business, and the general partners afterwards made absolute purchases of cotton and rice in large quantities, the seller claimed that the special partner was liable *in solido* for the purchase-money, on the ground of alteration in the business; but there being no proof of his knowledge or assent, he was held not so liable. *Singer* v. *Kelly*, 44 Pa. St. 145; affirming s. c. sub nom. *Singer* v. *Macalester*, 4 Phila. 312. See chapter on ALTERATION.

So where the general partners in a firm formed in Michigan to manufacture furniture had been in the habit of purchasing clothing for their individual use on the credit of the firm, it was held that the general partners had no authority to bind the firm beyond the purposes and scope of the partnership; that no departure by them, however common or long continued, if not

[1] The limitation "in the same locality," though perhaps not generally stated in text-books, is inferentially stated and is clearly correct, and was recognized by Mr. Justice MATTHEWS in *Irwin* v. *Williar*, 110 U. S. 499, 505.

consented to or known and acquiesced in by the special partner, could enlarge the scope of the business as specified in the articles; and all persons dealing with it are chargeable with notice of the scope of the business as specified in the articles, if duly filed and published as required by law. *Taylor* v. *Rasch*, 1 Flippin, C. C. 385; s. c. 11 Bankr. Reg. 91.

But although the public must thus take notice of the scope of the business and the limited liability of the special partner, they have a right to rely on representations by the latter if he holds himself out to them as a general partner, as he did in *Barrows* v. *Downs*, 9 R. I. 446; *Watts* v. *Taft*, 16 Up. Can. Q. B. 256.

Where one of the general partners was executor of an estate and wrongfully loaned to the firm interest-bearing securities, — viz., $28,000 in United States bonds and 513 shares of Fort Wayne stock, — and the special partner knew of such loan, it was held that his knowledge of the irregularity put him on inquiry as to the firm's use of such securities; and if he chose to sleep on such a disclosure instead of examining the books and ascertaining what was done with them, he was liable as a general partner for the conversion of them by the firm; that the executor's knowledge that the defendant was a limited partner did not bind the estate; and that the succeeding executor could recover. *Guillou* v. *Peterson*, 89 Pa. St. 163.

It must be noted as to this case, however, that these were interest-bearing securities and not unemployed funds of the estate, and that the firm knew of the irregularity in the executor loaning them. By the law of general partnership, had the firm not known of this they would have been indebted to the general partner, and not the estate. The special partner in this case was really liable as a general one for an informality (it is not stated what) in renewal, and the proceeds of the securities were applied to pay a debt for which the special partner was liable *in solido;* hence the above ruling may possibly be a dictum.

RELATIONS OF THE SPECIAL PARTNER TO THE FIRM AND THE PROPERTY.

§ 69. There have been numerous attempts to describe the nature of the special partner's interest by analogy to other legal relations.

Thus, the contribution of the special partner is in the nature of a trust, *Coffin's Appeal*, 106 Pa. St. 280, 285. "A kind of quasi-corporation," *Hayes* v. *Bement*, 3 Sandf. 394, 397. The nature of the interest is like a debt rather than like corporate stock. It is a sum invested in the partnership enterprise, to be reimbursed at the end of the period, if not lost in business with any undivided profits. It is not payable *in presenti*, and is probably not in strictness of language a debt at all, but is held in trust for the special partner, to be employed in the business, and finally returned if not lost. Per DENIO, C. J., in *Harris* v. *Murray*, 28 N. Y. 574, 582. It is in the nature of a thing in action, which may be subjected to the payment of the debts of the owner by a proper proceeding. *Ib.* 580.

The special partner as such has no interest or part-ownership in the property. He contributes a certain sum to the capital stock *in cash*, which he is to receive back at the termination of the partnership with interest. He is also entitled to a share of the profits; he thus has a claim, "but it is against the whole policy of the limited partnership act that he should have as against third persons or the creditors of the firm a particle of interest in the partnership property." Upon payment of this claim the property would belong to the general partners. *Artisans' Bank* v. *Treadwell*, 34 Barb. 553, 560. INGRAHAM, J., in *Harris* v. *Murray*, 28 N. Y. 574, 577–8.

In a case where there were some eighty special partners, it was said, "The position of a special partner is very analogous

to that of the holders of stock in an incorporated company." Per DRAPER, C. J., in *Whittemore* v. *Macdonell*, 6 Up. Can. C. P. 547, 551.

§ 70. The special partner has an interest in the property of the firm amounting to an equitable title. He cannot have a legal title in the real estate, for that would withdraw it from the control of the general partner (see under WITHDRAWAL). Whether he can be said to have a legal title as joint tenant in any of the personal property, may be a matter of no importance, except as involving the general partner's right to make an assignment for the benefit of creditors; for the general partner's control and power of disposition would not be affected in personal property as it would in real by the nature of the title. The statutes in making a judgment necessary against the general partners alone (see Part IV.) may, but do not necessarily, tend to show that he has no legal title in the personal property.

The doctrine seemingly laid down in the two cases above cited of *Artisans' Bank* v. *Treadwell*, 34 Barb. 553, 560, and *Harris* v. *Murray*, 28 N. Y. 574, 577, — that he has no interest whatever in the property, or is a mere creditor, — is entirely wrong. It is utterly inconsistent with the principles: that the individual debts of the general partner are postponed to debts incurred by him as a partner; that the special partner has the rights of a partner when an attempt is made to seize the firm's property for the general partner's individual debts; that he has on dissolution the right of a partner to wind up the business if the general partner is unable or unwilling to do so; and that he may resort to

equity to compel the general partner to account, and I think it is also inconsistent with the statutory provision against interference — though this has been denied; for how can he interfere where he is a creditor merely?— and the provision that only the general partner need sue or be sued, shows he is regarded as a silent partner, and not as a creditor.

The legislature evidently intended that the legal title to all the partnership property should be vested in the general partner alone, and that the whole business should be conducted just as though there were no special partner. He might alien or encumber it, and a judgment against him would be a lien on his undivided share requiring the aid of a court of equity to adjust the liens and give the creditors their priority, for the statute provides that the general partners alone are to be sued; yet a judgment against the general partners would not affect the whole title, but it would be necessary to sue the special partner also to subject the property. Moreover, he would have to join in order to convey or encumber it. *Madison County Bank* v. *Gould*, 5 Hill, 309, 313.

Where an execution against the general partner individually was levied, and not the interest of the partner, but the whole property was sold, the special partner was held to have an action against the officer as trespasser *ab initio* for the injury to his individual right, in *Spalding* v. *Black*, 22 Kan. 55.

The same question arose, but was evaded by the court, in *Vandike* v. *Rosskam*, 67 Pa. St. 330. There the special partner had contributed goods which were levied on, on execution against the other partner. The special partner claimed the goods to be his, which they obviously were not; but the court stated that had the firm claimed the goods as property of the firm, the sheriff could only have sold the general partner's interest.

In *Bradbury* v. *Smith*, 21 Me. 17, the special partner had contributed the whole capital; but the statute had not been complied with, in that the firm name contained "& Co.," and a levy was made on process against the general partner alone, and the firm brought an action of trespass. The court held that whether the partnership was general or special, the goods were partnership property, and the separate interest, therefore, liable to levy. Thus this case decides nothing further than that both have an interest.

If the special partner has contributed all the capital and there were no profits made, there would be no assets which the assignee of the general partner for the benefit of creditors ought to touch; and if the special partner converted to his own use property of the firm, such assignee of the general partner cannot maintain an action against him in tort therefor. *Nutting* v. *Ashcroft*, 101 Mass. 300, 301, as explained in *Wilkins* v. *Davis*, 2 Low. 511, 516; s. c. 15 Bankr. Reg. 60. The assets are not the property of the general partners, but the common stock of all. *Nutting* v. *Ashcroft*, 101 Mass. 300, 301.

A sale on execution of the interest of the special partner in the property of the firm was held to pass no title whatever. *Harris* v. *Murray*, 28 N. Y. 574. On p. 576 of this case a reason assigned by Ingraham, J., for the ruling is, that as the special partner is forbidden by the statute from interfering or withdrawing any part of the capital, the sheriff cannot do what the special partner could not do. But this reason must be explained; for in general partnerships one partner cannot use the firm's goods nor his own interest in them to satisfy his general creditor against the will of the other partners until settlement of the concern. If the above reasoning were good, it would follow that, therefore, the sheriff could not do so; but an exemption from execution is never awarded to a man who has taken a partner in the property, but an ascer-

ainment of his interest is ordered, though it involve a dissolution before the term of partnership has expired. The reasoning of Denio, C. J., is much more consistent, — that the special partner has no title in the property.

The rule that a pledgee cannot be the purchaser at a sale of the pledge made by himself, was held not to apply to a purchase by the special partner at a sale by the firm of a pledge. The general rule was not stated to rest on the ground that a trustee cannot buy at his own sale, but that no one can purchase where he has a duty to perform inconsistent with the character of purchaser; and it was therefore deduced that the special partner, having no duty to perform, and in fact being forbidden by statute to interfere, was not incapacitated to purchase. But either method of statement leads more or less directly to the inference that he has no title in the firm's interests. *Lewis* v. *Graham*, 4 Abb. Pr. 106.

Where a lease was made to the firm giving the lessor a lien for rent on all property then on, or which might thereafter be brought upon, the premises, and the special partner was ignorant of this clause, and after the dissolution of the firm bought out the general partners and conducted the business himself, he cannot claim the rights of a purchaser without notice. Though in a sense he may have been one, yet he was a party in interest. *Wisner* v. *Ocumpaugh*, 71 N. Y. 113, 117.

So where the firm, consisting of one general and one special partner, conducts its business in the individual name of the general partner, viz., John Meads, Jr., Leonard, J., properly ruled that individual claims against the general partner were distinct from the partnership liabilities. *Kerr* v. *Blodgett*, 48 N. Y. 62, 69; see also *Oliphant* v. *Mathews*, 16 Barb. 608; *Coffin's Appeal*, 106 Pa. St. 280, where the assumption by the general partners of a debt due by the special partner was held void as against the firm, but valid as against the general partners. See also the chapter on Insolvency.

§ 71. That special partners have no greater rights in the property than partners in a general partnership, would seem self-evident; thus, as stated above, though the special partner has contributed all the capital or specific goods, they cease to be his and become the firm's, and he is a creditor for so much capital, with the usual partner's lien therefor, which gives him a priority over all individual creditors of the co-partners. *Bradbury* v. *Smith*, 21 Me. 117; *Vandike* v. *Rosskam*, 67 Pa. St. 330.

So, in *Locke* v. *Lewis*, 124 Mass. 1, 18, 19, Gray, C. J., in a most elaborate case several times argued, and five years before the court, after holding that a sale by a partner of firm-goods, in consideration of his own pre-existing debt to a creditor who did not know of the existence of the firm, was valid (a proposition which it is not necessary to examine here), says: "The fact that the partners who did not concur in the sale . . . were special partners . . . gave them no peculiar right. . . . We assume that they are to be treated as jointly interested with the general partners in the partnership stock. . . . But while the statute, if its conditions are complied with, shields them from being charged as general partners . . . it does not give them any greater rights than they would — if they had been general partners and liable as such — have had to avoid sales of goods by the partnership, which, by their assent, for their protection and benefit, the ostensible partners had been enabled to deal with as apparently their own property."

EFFECT ON THE RELATIONSHIP WHERE THE FORMATION IS DEFECTIVE OR DELAYED.

§ 72. By the statute "no such partnership shall be deemed to have been formed until a certificate," etc., and affidavit is filed, and in Kentucky, Missouri, and Oregon until publication is made. In other words, in

case of a defect in subsequent steps, there is a partnership, but the statutory protection is lost; but in case of defect prior thereto, the statute says the partnership is not deemed formed. But we have seen (§ 37 above) that if the partnership is launched, that is, if any business transaction is had, there is a partnership; but it is a general one. So if the business is launched in the intervals between the steps of formation regularly taken, — for example, if the filing of the certificate is delayed (for, unlike publication, such filing is not required to be immediate), — the intended special partner is a general one. His position in such cases must be examined, — First, with reference to his co-partners; and Second, with reference to third persons.

§ 73. **As to his Co-partners.** — If the partnership becomes a general one as to third persons, it does not follow that the special partner becomes a general one as to his co-partners. His powers as to them are those fixed by his contract, and that can only be modified by common consent. That he cannot enlarge his powers by taking advantage of his own wrong, is obvious, though he may enlarge those of his co-partners.

In Upper Canada it was said by ESTEN, V. C., that the proposition that where the partners act by common consent so as to constitute a general partnership *quoad* third persons, they are such for all purposes, is utterly untenable, and if they "intend that a special partnership shall exist, they will be bound to observe their mutual understanding amongst themselves," *Patterson* v. *Holland*, 6 Grant's Ch. (Up. Can.) 414, 417; but on the reversal of the case this was limited. In

that case — a suit by special partners for dissolution — some of the special partners had paid in their capital by notes instead of actual cash, and were therefore general partners as to third persons; and it was held a general partnership for all purposes *inter se* as well as to others, for that otherwise the special partners, having become liable *in solido*, would be unable to terminate the partnership, but must see it go on, while they were excluded from the management, and their liability constantly increase, — which would be absurd and unjust, and therefore the suit could be maintained. *Ib.* 7 Grant's Ch. (Up. Can.) 1.

The case was unquestionably rightly decided; but this reasoning is more than doubtful, for it is based on the assumption that the special partner could obtain no relief unless he becomes a general one, whereas he is not deprived of relief by being a special partner, nor does his being a general one necessarily avail him. It is far from clear that a partner in a general partnership which has been contracted for a definite time, and not at will, can dissolve it at pleasure;[1] and on the other hand, if a cause for decreeing dissolution exists, it is as available to a special partner as to any other. See chapters on DISSOLUTION.

If there has been a non-compliance with the statute by a failure to pay his capital in cash by the special partner, he does not become a general partner except in liability; he may be regarded as a dormant partner, and not an active one. It is by no means clear but that his non-compliance, while it subjects him to the liabilities of a general partner, still leaves him sub-

[1] See article by Mr. Benjamin F. Rex in 23 Am. Law Register, 689, for November, 1884.

ject to the disabilities of a special one, with the control remaining in the other partners; so held in special term in 1854, *Robinson* v. *McIntosh*, 3 E. D. Smith, 221, 233–234. But in a special term case, Supreme Court, in 1853, it was said by MITCHELL, J., *arguendo*, that a special partner is a partner as much as a general one, and can at any time — unless excluded by the articles — take an active part in the management of the concern, subject only to the statutory consequences of general liability, and his partners have no right to complain, nor have the creditors. *Hogg* v. *Ellis*, 8 How. Pr. 473, 474.

"We do not intend, however, to say that the agreement of partnership has no validity; for as between themselves all their settlements must be in conformity with it," per CHAPMAN, J., in *Lancaster* v. *Choate*, 5 Allen, 530, 539. "The inclination of my mind is to hold that he [the special partner, "deemed" a general partner by reason of interference] merely incurs the liability of a general partner, without acquiring his authority," per DRAPER, C. J., in *Whittemore* v. *Macdonell*, 6 Up. Can. C. P. 547, 552. On the other hand, in *Bowes* v. *Holland*, 14 Up. Can. Q. B. 316, 324, ROBINSON, C. J., says: "By participating in this transaction of the business of the partnership, Mr. Bowes subjected himself to be deemed a general partner. I am not sure that the legislature meant by that anything more than that he might be held liable to the creditors as a general partner, and not that it was to affect the relation between himself and the other partners, either general or special. . . . I think it safest to hold that the statute invests him with the character of a partner to all purposes."

Where the special partner's liability as a general one results from acts of all the partners, they are estopped to complain; thus, where the general partners turned over assets of the firm, when insolvent, to the special partner, their title and right to complain is gone, and it was held in the same case that the special partner could insist on execution being issued against

them first, before he is called to account, *Bell* v. *Merrifield*, 28 Hun, 219, 226; *Brown* v. *Davis*, 6 Duer, 549. And where the special partner's contribution had been paid by check instead of cash, it was said that only creditors could take advantage of it, and that in form the partnership was limited. *Durant* v. *Abendroth*, 97 N. Y. 132, 144–5; and see *Guillou* v. *Peterson*, 89 Pa. St. 163.

§ 74. **As to Third Persons.** — Prior to completion in regular mode of a limited partnership, the special partner, if business is begun, is a dormant or secret partner in a general partnership unless he forfeits that relation by acting as an ostensible partner. This was so held in *Lachomette* v. *Thomas*, 5 Rob. (La.) 172; *Robinson* v. *McIntosh*, 3 E. D. Smith, 221.

§ 75. It is necessary here to resort to some principles of the law of general partnership.

I. The mere agreement to form a partnership does not constitute a partnership, for it is executory until the partnership is what is commonly called "launched." For an application of this rule in limited partnerships, see *Gray* v. *Gibson*, 6 Mich. 300.

II. Absolute and universal secrecy is not essential to dormancy; but a difference between holding out to constitute one a partner and holding out to destroy dormancy must be made. Holding out to constitute one a partner proceeds on the doctrine of estoppel, and therefore must be the act of the person himself, or by his assent or connivance, or in some way to estop him; but holding out to terminate dormancy may be the act of the co-partner alone, and in violation of agreement and without the knowledge of the dormant partner, for it merely is to destroy secrecy, and may therefore proceed

from any source.[1] This is of importance as showing that one who intends to become a special partner may lose the character of secret partner without being guilty of such interference as would forfeit his right to become a special partner.

III. Secret terms in partnership articles limiting the powers or liability of a partner bind nobody outside the firm, unless knowledge of them is brought home to him.

IV. In case of the dissolution of a general partnership in order to terminate the responsibility of each member for future acts in the firm's name by any other member, actual notice of the dissolution must be brought home to those who have previously dealt with the firm to counteract their actual knowledge of the firm, and a general notice (usually by advertisement) to all others; such general notice being supposed in legal contemplation to counteract the general repute of partnership. Actual notice of the revocation of the agency of each for all is required to former dealers, for the reason that they are conclusively (this language is not too strong) presumed to have trusted to the credit of all ostensible partners, — *i. e.*, the law will not investigate the fact of an actual knowledge of their existence; but as such creditors could not have trusted to the credit of a secret or dormant partner, no notice actual or by advertisement is required as to him without affirmative proof that the former dealer, seeking to bind him, knew of

[1] This was denied by BALDWIN, J., in dissenting opinion in *Winship* v. *Bank of United States*, 5 Pet. 529, 574; but see *Deering* v. *Flanders*, 49 N. H. 225; *Park* v. *Wooten*, 35 Ala. 242; *Davis* v. *Allen*, 3 N. Y. 168; *United States Bank* v. *Binney*, 5 Mason, 17 (affirmed, 5 Pet. 529).

his membership. But if a former dealer with the firm knew of the dormant partner's membership he is entitled to actual notice of the dissolution, and persons not former dealers, but who knew of his connection, are entitled to general notice.

§ 76. Applying these principles to a limited partnership, which for want of punctual record has been for a time a general one, such change from general to limited is clearly not a dissolution and the formation of a new firm; for if it were, a new contribution of cash capital would be necessary, which has not been held, and creditors of the former firm would sustain a relation to the assets distinct from those of the latter.

The cessation of a general liability by such transformation of the partnership into a limited one by due completion of the steps, need not be accompanied by actual notice to former dealers, if the special partner has preserved his character as dormant partner. If he, however, has become known to be a partner to any one dealing with the general firm, such former dealer would certainly seem entitled to actual knowledge of the change; and if such dormant partner has been made generally known to be a partner in the manner stated in Rule II. above, it would further seem that the public or non-dealers would be entitled to constructive notice, as by publication. The published notice of the terms of the limited partnership, if it identified the altered firm as not being a different concern from the old, would probably answer for this.

§ 77. As to the knowledge of the person giving credit to the firm that the partners intended it to be a limited partnership, the following dicta are of interest.

It was said that, the partnership being thus general, the principle then involved is whether the contract of the partner with his co-partners is for a limited liability, and whether the person dealing with the firm had actual notice of such contract, in *Fox* v. *Graham*, Michigan Nisi Prius Cases, 90; *Levy* v. *Lock*, 47 How. Pr. 394, 397; s. c. 5 Daly, 46, 48. That in case of a mistake in the published notice, absolute notice that the creditor knew the actual facts would be necessary to claim the benefits of the statute, *Smith* v. *Argall*, 6 Hill, 479, 482; *Medberry* v. *Soper*, 17 Kan. 369.

So in the Supreme Court of Pennsylvania, in 1877, it was said that one who sues a partnership may properly be asked in cross-examination whether he did not give credit to them as a limited partnership; and that if he did deal with them as such, the burden is on him to show that the partners are liable as a general partnership. *Whilldin* v. *Bullock*, 4 Weekly Notes of Cases, 234.

In 1848 the same court had ruled that it made no difference that the creditors knew the firm to be a limited one and the defendant a special partner merely; they also knew that if the defendant failed to comply with the requisites of the act, he became liable as a general partner, and the contract is presumed made according to the legal rights of the parties. True, a special contract to trust to the credit of the general partner only would be a good defence; but such contract must clearly appear, and will not be inferred from knowledge: and a mere allegation in defence that the creditor trusted to the general partner, and not to the special partner, does not amount to an averment of such special contract. *Andrews* v. *Schott*, 10 Pa. St. 47.

In Oregon, § 6, Wash. Ty. § 2375, Vt. § 3695, Cal. § 7503, Dak. Ty. § 1470, and Wy. Ty. § 21, the statute provides that if the special partner was dealt with in certain ways as such, he preserves the rights of one towards the dealer. These statutes are given more fully under Interference.

§ 78. Reading these dicta in the light of Rule III. above, gives strong ground for urging that actual notice that the partnership is intended by its members to be a limited one, will relieve the special partner from a more extensive liability. If that be the law, it would be subject to the following limitations, — First, the burden of proof to show such notice is upon the partner seeking the protection of the statute; Second, mere knowledge by the creditor that papers for a limited partnership had been executed is not alone sufficient: for *non constat* but that the partners have abandoned their design of coming under the statute.

But there is grave doubt whether the claim of being a special partner can be sustained by proof of notice to the creditor when the organization is defective. The statute is express and positive, and takes no notice of any such limitation except in the six above-named States. And in the case of a partnership association limited, contracting in its quasi-corporate name, there was a fatal defect in its formation, and it was urged by counsel and held by the court below that contracting with the association in its corporate name estopped the creditor to deny its capacity to contract as a duly organized limited association, in analogy to the rule applying to corporations; but the Supreme Court of Pennsylvania (1885) have reversed the decision, holding that no such estoppel arises, that the plaintiff might show the defect and hold the members individually. *Eliot* v. *Himrod*, 16 Weekly Notes (Pa.), 189; reversing s. c. 15 *ib*. 77.

CHAPTER VII.

CONFLICT OF LAWS AND FOREIGN FIRMS.

§ 79. Attention has already (p. 80) been called to the fact that most of the statutes allow a limited partnership to be formed for the purpose of doing certain business "in this State." This does not prevent the partnership from having transactions in other States in the conduct of its business in the State of its formation, as will be obvious from the authorities cited in this chapter.

This leads to the subject of the conflict of laws,—a large part of which would be applicable, and which, therefore, should perhaps be left to works upon private international law; but for the sake of keeping all the cases on limited partnership together, the subject will be briefly noticed here.

§ 80. **General Rule as to Foreign Laws.**—The common but misleading statement that the statutes of a State have no extra-territorial force, is quite true as to the remedy (unless where an exception is made as to statutes of limitations,—if this can be considered an exception), but in relation to rights once acquired is only true in a strict sense.

The contract relationships of parties to each other fixed under a foreign law, as creditor, lienor, possessor, partner, and their contraries, follow them—although

they may be founded on a statute — into other jurisdictions, if not inconsistent with the laws of the latter.[1] This is not giving a foreign statute an extra-territorial force, but is the recognition by comity of rights elsewhere acquired. The remedy, however, in enforcing the rights of parties is the *lex fori.*

These two rules were applied in New York, where the general and special partner of a Virginia limited partnership brought suit for the proceeds of goods sold for the firm. It was claimed by defendants that the special partner was improperly joined as a co-plaintiff, the statutes both of New York and Virginia requiring actions to be brought by and against the general partner. The court held that the Virginia statute as to parties could only apply in Virginia courts, that the New York statute applied only to New York partnerships, that in this case the general rule applied that the real parties in interest must sue, and that therefore the action was properly brought. *Rosenberg* v. *Block*, 50 N. Y. Superior Ct. 357; but see my criticism on this case at § 192.

Where a creditor of the firm of B — composed of B as general partner and C and W as special partners — brought suit against the firm in another State by attachment, it was held proper not to have joined C and W as co-defendants, for two reasons, — First, because of the rule that dormant partners need

[1] The above is limited to *contract* relationships, as a limited partnership is. It may be said that even then the statement is too broad. Nevertheless, it seems to me that the drift of the latest law is still broader. For example, take a class of cases represented by *Woodard* v. *Railroad Co.*, 10 Ohio St. 121, holding that, where a person is liable to damages for wrongfully causing the death of another under a statute in force at the place of the wrongful act, the liability is not enforceable in another State, though the latter have a similar statute; yet this class of cases will be found vigorously disapproved of in *Dennick* v. *Railroad Co.*, 103 U. S. 11, 21.

not be made defendants, it not appearing that plaintiff knew of the special partners; and Second, because the limited liability of the special partner will be respected in other States. "In the absence of any acts of the special partner whereby, under the general principles of law, he would incur the liability of a general partner, the limited liability of the special partner is recognized and protected by the courts of other States according to the law of the State in which the limited partnership is formed." *Lawrence* v. *Batcheller*, 131 Mass. 504, 509; s. c. 12 Reporter, 785.

A dictum to the same effect was made, the court saying that had the foreign partnership perfected its formation, the right of action would have been in the general partner alone. But the attention of the court had not been called to this point. *Gray* v. *Gibson*, 6 Mich. 300, 310.

Where a limited partnership is formed under the laws of and its business carried on in Vermont, the power of the partners to bind each other by purchases on credit in New York is to be determined by the laws of Vermont; and the statutes of New York as to limited partnership are therefore not admissible in evidence. *Hastings* v. *Hopkinson*, 28 Vt. 108.

If a foreign limited partnership cannot deal outside of the country where it was formed without subjecting the special partner to general liability in derogation of their compact, the effect would be to restrict commercial enterprise and prevent mercantile intercourse, which is against public policy and public good. *King* v. *Sarria*, 7 Hun, 167, 170.

This case was affirmed in the Court of Appeals, where it was held that rights once well accrued by the law of the appropriate sovereign are treated as valid everywhere. It is not the statutes of one community which extend their controlling power into the territories of another; it is the sovereign of each who adopts the foreign rule and applies it to those particular cases in which it is found necessary to protect and cherish the mutual

intercourse of his subjects with those of the country whose laws he adopts. *King* v. *Sarria*, 69 N. Y. 24, 31; 25 Am Rep. 128.

The contract of partnership was to be performed in Cuba, and the contract sued upon was made by the partnership in New York, and is to be construed and enforced by the laws of New York; and the laws of the latter will determine the nature and extent of the liability of the partnership, and the laws of the former will determine the liability of the special partner and the extent of authority of the general partners to bind him. *Ib.* 69 N. Y. 32.

The same ruling was made in Rhode Island of a Cuban partnership where the goods were bought in New York, partly by letter and partly by a general partner present there, to be paid for in New York, in *Barrows* v. *Downs*, 9 R. I. 446.

So in a Pennsylvania case the court examined the law of New York, under which the firm was formed, to ascertain whether the special partner was to be held liable on a note. *Hogg* v. *Orgill*, 34 Pa. St. 344.

The statement of facts in many of the other cases will also show that the court is adjudicating as to limited partnership formed in other States, though no comment on this fact be made; thus in *Ward* v. *Newell*, 42 Barb. 482; s. c. 28 How. Pr. 102; *Locke* v. *Lewis*, 124 Mass. 1 (of a New Hampshire partnership).

§ 81. **Evidence of Foreign Law.** — It was held that an expert in foreign law could testify to the written law without producing it, and could produce a copy of the statutes or foreign code and refer to it for the purpose of refreshing his memory. A Spanish lawyer who had practised law in Cuba was allowed to testify from a printed copy of the Spanish Code of Commerce as to laws regulating special partnership in Cuba. *Barrows* v. *Downs*, 9 R. I. 446.

The question whether an attorney-at-law of Illinois learned in the law could testify in a New Jersey court as to the Illinois law of limited partnerships was raised and called a debatable proposition, but was not decided, the partnership having been found to be a general one, in *Taylor* v. *Webster*, 39 N. J. Law, 102.[1] Some of the States, however, make the printed volumes of statutes evidence.

[1] The above case of *Barrows* v. *Downs* is mentioned in the text, not as in any way peculiar, but because it is a limited partuership case. The current of the law is quite marked that printed copies of the statutes of sister States purporting on their face to be published by authority, will be received in evidence without further evidence of authenticity, public notoriety being assumed as proof of genuineness, as the following full but far from exhaustive list of authorities shows: *Clanton* v. *Barnes*, 50 Ala. 260; *Clarke* v. *Bank of Mississippi*, 10 Ark. 516; *Eagan* v. *Connelly*, 107 Ill. 458; *Rothrock* v. *Perkinson*, 61 Ind. 39; *Greasons* v. *Davis*, 9 Iowa, 219; *Taylor* v. *Bank of Illinois*, 7 Mon. 576, 585; *Hueston* v. *Jones*, 2 La. Ann. 937; *Raynham* v. *Canton*, 3 Pick. 293; *Merrifield* v. *Robbins*, 8 Gray, 150; *Goodwin* v. *Appleton*, 22 Me. 453; *Wilt* v. *Cutler*, 38 Mich. 189; *Emery* v. *Berry*, 28 N. H. (8 Foster), 473; *Hale* v. *Ross*, 2 Penn. (N. J.) 373 of reprint; *Larwell* v. *Hanover Savings Fund Society*, 40 Ohio St. 274, 281; *Kean* v. *Rice*, 12 S. & R. 203; *Mullen* v. *Morris*, 2 Pa. St. 85; *Ellis* v. *Wiley*, 17 Tex. 134. *Contra*, *Van Buskirk* v. *Mulock*, 3 Harr. (N. J.) 184; *Monroe* v. *Guilleaume*, 3 Keyes, 30; *Packard* v. *Hill*, 2 Wend. 411; *Bailey* v. *McDowell*, 2 Har. (Del.) 34; *Hempstead* v. *Reed*, 6 Conn. 480. Also the published reports of the foreign courts: *Inge* v. *Murphy*, 10 Ala. 885; *Hale* v. *New Jersey Steam Navigation Co.*, 15 Conn. 539; *Billingsley* v. *Dean*, 11 Ind. 331; *Ames* v. *McCamber*, 124 Mass. 85; *State* v. *Looke*, 7 Oregon, 54; *Grant* v. *Henry Clay Coal Co.*, 80 Pa. St. 208, 217; *Territt* v. *Woodruff*, 19 Vt. 183. The statute-books of foreign countries have also been so admitted. *Ennis* v. *Smith*, 14 How. 400, 429; *Pierce* v. *Indseth*, 106 U. S. 546, 551; *O'Keefe* v. *United States*, 5 Ct. of Claims, 674; *Rothschild* v. *United States*, 6 Ct. of Claims, 204; *The Pawashick*, 2 Lowell, 142. If the volume of statutes purport to be a private enterprise it is not thus received. *Rape* v. *Heaton*, 9 Wis. 328; *Martin* v. *Payne*, 11 Tex. 292; *Phillips* v. *Murphy*, 2 La. Ann. 654. The oath of a witness — though he is

§ 82. **Defects not fatal in the Foreign Law, but fatal by the Lex Fori.** — Where a foreign law under which a contract of limited partnership is formed and where the firm has its domicile, and where the special partner, there called a *comanditario*, is domiciled, requires registry of the terms of partnership, but the omission to register does not have the effect of making the *comanditario* liable as a general partner, the contract of partnership will be construed according to and governed by the laws of the country where it was formed, in an action on a contract made by the general partners in the country where the action is brought. *King* v. *Sarria*, 69 N. Y. 24; 25 Am. Rep. 128; affirms s. c. 7 Hun, 167.

not a lawyer — that the volume of statutes is regarded as authoritative is admitted as proof of genuineness. *Greasons* v. *Davis*, 9 Iowa, 219; *Owen* v. *Boyle*, 15 Me. 147, of a Canadian statute; *Hall* v. *Costello*, 48 N. H. 176; *Hynes* v. *McDermott*, 82 N. Y. 41, 56; *Pacific, &c. Gas Co.* v. *Wheelock*, 80 N. Y. 178; *American Life Ins. & Trust Co.* v. *Rosenagle*, 77 Pa. St. 507; *Spaulding* v. *Vincent*, 24 Vt. 501.

The unwritten law is proved by the testimony of experts; authorities sustaining this can be everywhere found. It is also held that if the foreign law consists of decisions or constructions of courts upon a statute, this may be proved by oral testimony, though it involve statutory with it as a compound of both. *Barkman* v. *Hopkins*, 11 Ark. 157; *Dyer* v. *Smith*, 12 Conn. 384, 390; *Hooper* v. *Moore*, 5 Jones L. (N. C.) 130; *Holman* v. *King*, 7 Met. 384; *Barrows* v. *Downs*, 9 R. I. 446; *Danforth* v. *Reynolds*, 1 Vt. 265; see also 31 Ala. 9; 8 Paige, 446; 41 Md. 59.

These authorities show that the case in the text above is according to the general current.

PART II.

CONDUCT OF THE BUSINESS.

§ 83. The terms "Withdrawal," "Alteration," and "Interference" have become part of the established technical nomenclature of limited partnerships.

Withdrawal refers to the division of profits to the special partner, whether as interest or dividends, which the actual earnings cannot afford, and which are therefore an encroachment on the special capital.

Alteration refers to a change in any of the matters specified in the certificate; as, for example, in the names or numbers of the partners, nature of the business or the capital.

Interference refers to an intermeddling by the special partner in the affairs of the partnership beyond that permitted by the statute.

CHAPTER I.

WITHDRAWAL OF PROFITS.

§ 84. Withdrawal, as defined above, does not refer to a withdrawal of the person from the firm, or of the capital by a sale of interest to a co-partner or to a stranger (which belong to Alteration), but solely to a division of profits known to be, or afterwards proving,

excessive. The statutes guard the integrity of the capital with scrupulous care, and compel the partners to make the dividing of profits or payment of interest or dividends secondary to its preservation.

The statutes, though the same in general effect, are in form founded on two models, — the first given below following the New York model, and the second that of Rhode Island, which may itself have copied an earlier form of that of some of the other States.

§ 85. **Statutes.** — "No part of the sum which any special partner shall have contributed to the capital stock shall be ["liable for any debts previously contracted by the general partners; nor shall any part of such sum be" GA. § 1934, PA. § 17] withdrawn by him, or paid ["or loaned," SOUTH CAROLINA] or transferred [words "or paid or transferred to him" omitted in ARKANSAS] to him in the shape of dividends, profits, or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest [such rate as may be agreed upon, not exceeding twelve per cent per annum, NEBRASKA and WISCONSIN] on the sum so contributed by him, if the payment of such interest shall not reduce the original amount of such capital; and if after the payment of such interest any profits shall remain to be divided, he may also receive his portion of such profits." [The last lines as to profits omitted in ILLINOIS and TENNESSEE.]

§ 86. "If it shall appear that by the payment of interest or profits to any special partner the original capital has been reduced ["or the firm shall be unable to pay its debts," GEORGIA], the partner receiving the same shall be bound to restore the amount necessary to make good his share of capital, with ["without," ALABAMA, ILLINOIS, NORTH CAROLINA, and TENNESSEE] interest." [No mention of interest in GEORGIA and MISSISSIPPI; "on being notified," DISTRICT OF COLUMBIA.]

ALA. §§ 2078, 2079.	ARK. §§ 4363, 4364.	DIST. COL. §§ 508, 509.
FLA. §§ 11, 12.	GA. §§ 1934, 1935.	
ILL. § 18.	IOWA, §§ 2161, 2162.	MD. §§ 13, 14.
NEB. §§ 15, 16.	N. C. §§ 3101, 3102.	N. J. §§ 15, 16.
N. Y. §§ 15, 16.	OHIO, §§ 3151, 3152.	PA. §§ 17, 18.
S. C. § 1329.	TENN. §§ 1748, 1749.	TEX. §§ 3456, 3457.
UP. CAN. §§ 12, 13.	UTAH TY. §§ 15, 16.	WIS. §§ 1714, 1715.

MISS. § 1015, includes both of the above sections, but for the former provides that any partner may annually receive his share of the profits if, by so doing, the original, etc., be not reduced.

§ 87. "During the continuance of any partnership under the provisions of this chapter, no part of the capital stock thereof shall be withdrawn, nor any division of the interest or profits be made, so as to reduce such capital stock below the sum stated in the certificate before mentioned; and if at any time during the continuance or at the termination of the partnership the property or assets shall not be sufficient to pay the partnership debts, then the special partners shall severally be held liable for all sums by them in any way received, withdrawn, or divided, with interest from the time when they were so withdrawn respectively."

IND. § 6040.	KAN. § 3361.	MASS. § 8.
ME. § 7.	MICH. § 2355.	MINN. § 15.
MON. TY. § 949.	NEV. § 475.	OREGON, § 7.
R. I. § 9.	VA. § 8.	VT. § 3696.
WASH. TY. § 2376.	W. VA. § 8.	

The same somewhat shortened, COL. § 2534; DEL. § 5; N. H. § 7, but allowing annual or semi-annual accruing interest, and imposing general liability as a penalty.

KENTUCKY, § 8: "If the whole or any part of the capital advanced by the special partner be withdrawn by him he shall be responsible to creditors therefor, with interest from time of withdrawal;" and by § 5 a withdrawal or diminution of capital other than by a loss in business or the defraying of such per-

sonal expenses of living as may have been originally agreed for, is a dissolution, and if thereafter carried on, the liability is general.

MISSOURI, § 3408, is like KY. § 8, except that general liability is made the penalty, and Mo. § 3405, is practically the same as KY. § 5, above, and by Mo. § 3403, the amount each special partner may withdraw for individual use must appear on the certificate.

CALIFORNIA, §§ 7493, 7494, 7495, DAK. TY. §§ 1463, 1464, 1465, and WY. TY. §§ 14, 15, 16 (which are word for word with each other), forbid the special partner's withdrawal of any part of the capital; but he may receive lawful interest and such proportion of profits as agreed on not paid out of capital, and is not bound to refund such payments for subsequent losses, but if he withdraws capital contrary to these provisions he is liable as a general partner.

CONNECTICUT, § 7, forbade any part of the capital to be withdrawn either as dividends, profits, or otherwise; but the Act of July 20, 1875 (Ann. Laws, p. 40), allows a payment not exceeding ten per cent on the contribution to be paid each year, but only out of net profits actually earned that year.

LOUISIANA, §§ 2812, 2822, the proportion of profits to be received, regulated by the covenant, forbids a withdrawal of the capital when those to whom it is advanced are in failing circumstances, or there is reasonable apprehension of becoming insolvent. No mention is made of dividing profits, and no penalty or consequences named. By § 2814, refunder of dividends fairly made during insolvency cannot be compelled.

§ 88. **What is a Withdrawal.** — There is a possible ambiguity in several of the statutes in the use of the word "capital." That no part of the sum contributed by the special partner is to be withdrawn in the shape of dividends, profits, or interest, doubtless means that net

profits may be divided; that is, that dividends which do not impair the capital are declarable at discretion. If so, it might seem to render unnecessary a specific statement that interest and profits may be declared, provided no encroachment on the capital results; yet without this, and under most of the acts even with it, a practical difficulty will occur, and that is, how to ascertain whether the capital is unimpaired. A concern whose transactions are numerous, cannot absolutely know the condition of its capital or even its own solvency; since these may largely depend on the success of enterprises, on the collectibility of outstanding accounts, and on the solvency or punctuality of others and the continued demand for its commodities. Hence it is but just that the penalty upon the special partners for honest and unintentional invasions of the capital should be merely restoration of withdrawn amounts, and not general liability *in solido.*[1]

§ 89. It appears from what has been said that a forbidden withdrawal may easily be made without illegal intention of any of the partners.

A withdrawal of the special partner's contribution is possible also without his consent or knowledge. Suppose, for example, a purchase of real estate is made with partnership funds taking the title in the names of all the

[1] In general partnerships a firm is not considered insolvent if there is a single solvent partner; though the converse is not true, for a firm may, in all States recognizing the priority of creditors of the firm, be solvent, though the partners individually are all insolvent. Insolvency in a limited partnership may not mean the same within some of the statutory provisions forbidding transfers in case of insolvency; thus it was said that the general partner might be insolvent but the firm solvent, in *Nutting* v. *Ashcroft*, 101 Mass. 300, 301; and in *Wilkins* v. *Davis*, 2 Low. 511, 516; s. c. 15 Bankr. Reg. 60.

partners, general as well as special; this is a withdrawal, for it places part of the title in the special partner and removes his proportion of the cost price from the control of the general partner and from the reach of the general creditors, since they can sue only the general partners, *Madison County Bank* v. *Gould*, 5 Hill, 309; yet the special partner may not have known or designed this act of withdrawal.

Again, suppose the special partner borrows the funds necessary to make his cash contribution, and the general partner in the firm name assumes the indebtedness: this must be regarded as a withdrawal; if for no other reason, because it would open the door to a connivance between the partners, which would result in sweeping the assets away from the creditors of the firm into the pockets of friends or private creditors of the special partner. *Coffin's Appeal*, 106 Pa. St. 280 (reversing s. c. sub nom. *Coffin* v. *Gruber*, 14 Weekly Notes, 140).

A loan of money on interest by the general partners to the special partner for one year, which on the day the partnership was formed was repaid with interest when due, is not a withdrawal by the special partner, for it has withdrawn nothing if it was a loan pure and simple, and the creditor must show that it was a colorable transaction. *Hogg* v. *Orgill*, 34 Pa. St. 344.

But where there was an actual present sale by the special to the general partner of his interest and a chattel mortgage given on the effects to secure the purchase-money, this is a withdrawal and an alteration also, *Beers* v. *Reynolds*, 12 Barb. 288, affirmed 11 N. Y. 97. But this case was distinguished from the following, holding that the giving of notes by the general to the special partner for the purchase of his interest payable in the future on an agreement for dissolution, is not a with-

drawal, even if the notes are negotiable but are not negotiated, for not a dollar has been withdrawn; at most an executory agreement or promise never carried out is shown, *Lachaise* v. *Marks*, 4 E. D. Smith, 610, 623.

In Louisiana the partner *in commendam* was allowed to stipulate for and receive monthly one half per cent on the gross sales in lieu of a share of profits. *Ulman* v. *Briggs*, 32 La. Ann. 657.

§ 90. The word "annually" in the statute, — that a partner "may annually receive lawful interest," — has been interpreted as referring to the rate, and not to the period of division.

In *Metropolitan National Bank* v. *Sirrett*, 97 N. Y. 320, 331; s. c. 15 Abb. New Cas. 318, 332, it was held that, as in the usury laws, this expression did not refer to the period of division, but to the rate per annum, and was not violated by more frequent periods of payment, and that where the articles of partnership permitted the special partner to draw interest on his capital monthly, this fairly construed only meant interest earned, and not a withdrawal regardless of profits.

§ 91. **During what Time it is forbidden.** — One caution must here be given, — the withdrawal is forbidden "during the continuance of the partnership." Now a partnership can only be terminated by operation of law, as death, etc., or by act of the parties; *i. e.*, in any other way than by its own limitation, by taking certain statutory steps, one of which is notice by publication for a certain number of weeks. Now the dissolution is not completed until the expiration of such publication; and until then a withdrawal of capital will be at the party's

peril, since it is a conscious and not an unintentional withdrawal. This mistake must not be made. See *Buckley* v. *Bramhall*, 24 How. Pr. 455; s. c. sub nom. *Bulkley* v. *Marks*, 15 Abb. Pr. 454.

§ 92. **Consequences of Withdrawal.** — In California, Dakota Territory, Florida, Missouri, New Hampshire, and Wyoming Territory, a liability as general partner seems to be imposed as a consequence of an inroad on the capital by a withdrawing of funds.

In other States this consequence of general liability is not in terms imposed, but a restoration of the amounts, with or without interest as each statute provides, is required.

But as the act of withdrawal is expressly forbidden and runs counter to the whole policy of the statutes, — if it is intentionally done, — or if an excessive division of profits is a device to accomplish the same end, a general liability has been imposed in favor of creditors as the only way of effectually preserving the policy of the law and maintaining the rights of others.

This was laid down in a case where the general partners made a purchase of land in the names of all the partners instead of in their own names alone, thus withdrawing from their control the special partner's proportion of cost price; and the court held that if this was with the participation or knowledge on the part of the special partner, he would be liable as a general partner, and if it was not, he would not be so liable. *Madison County Bank* v. *Gould*, 5 Hill, 309. This case is not quite conclusive, perhaps, as to the non-liability, for if it was without his knowledge, it was independent of any act of his; whereas an inroad on the capital by an excessive dividend of profits, though unin-

tentional, may be by an act of his, and its illegality could perhaps have been ascertained in advance by an examination by him.

It was subsequently held, however, in the general term of the New York Common Pleas Court that receiving dividends as a device to withdraw capital would render the special partner liable as a general one, but that receiving dividends in good faith which it afterwards turns out that the firm cannot afford, does not have this effect, and their restoration merely is required. *Lachaise* v. *Marks*, 4 E. D. Smith, 610, 625, which was cited with approval in *Bell* v. *Merrifield*, 28 Hun, 219, 223. A receipt of capital with knowledge that it was such was also held to render the special partner liable for subsequent engagements in *Buckley* v. *Bramhall*, 24 How. Pr. 455; s. c. sub nom. *Bulkley* v. *Marks*, 15 Abb. Pr. 454.

So also where after dissolution the special partner, being unable to obtain a settlement, and claiming that the other partners were fraudulently appropriating assets, brought a suit for account, receiver, and injunction, and afterwards a compromise was made by which he received securities, which were assets of the firm, in full of all claims either on account of profits or capital, and an unpaid creditor argued that this was a withdrawal while there were outstanding debts, and hence general liability, the court said that to so hold would be affixing a penalty for prosecuting what he supposed to be his just rights, and that the section related to an existing and not a dissolved partnership. *Pusey* v. *Dusenbury*, 75 Pa. St. 437.

In *Hampden Bank* v. *Morgan*, 2 Haz. U. S. Comm'l & Statis. Reg. 57 (U. S. C. C. 1840), Judge Betts, in an action by a creditor on an account, charged the jury that an illegal withdrawal by the special partner only made him liable to repay the amount. This is worthless as a precedent, however, because the jury found there was no withdrawal, and because the special partner was liable as a general one by reason of several other violations of the statute.

§ 93. **Withdrawn Funds how reached.** — The statute says that the special partner shall restore all amounts improperly withdrawn, but does not say to whom or how he shall be made to respond. In ascertaining how the amounts received by him and found to be needed for the payment of debts can be reached, the general rule of partnership law must be remembered; viz., that one partner cannot sue another at law unless there has been a dissolution and a full accounting and a balance struck, or such figures reached that striking a balance is a mere matter of computation, and that until this is done the remedy of a partner is solely in equity, — *i. e.*, to file a bill making all the other partners defendants and asking an accounting and settlement.

As the application of this rule depends on the reason of the rule, that reason must be distinctly understood; it is founded on the prevention of a multiplicity of suits. A partner who has paid more than his share of debts or loaned money to the firm cannot sue them on contract — *i. e.*, at law — to recover the amount; for if he could do so, it may be that another partner has also made advances, or may thereafter pay more than his share of debts, and would then have an action against the others, including the former plaintiff, to recover. Even if there are no debts, yet if there are outstanding accounts, or even a single outstanding account, a partner is not allowed to sue the others for his advances or his share of the profits; for as each partner is authorized to collect outstanding accounts, he might thereafter, by collecting more than his share, become the debtor of the others: therefore, as the judgment at law would not settle the partnership concerns *inter se*, he cannot sustain the action.

But wherever such judgment would make an end of all controversies between the partners, — as, for example, if the plaintiff relinquishes or assigns to the defendant all his interest in the outstanding claims, or if nothing remains but to collect the balance ascertained, — he can sue at law. The doctrine that an express promise to pay the balance ascertained to be due by the mutual settlement of accounts is necessary to an action at law, is repudiated in the United States.

§ 94. The statutes require actions to be against the general partners alone (§ 183), unless the special partner has made himself liable as a general one. It would seem, therefore, that the creditor cannot in the first instance sue the special partners who have withdrawn capital, either alone or as co-defendants with the general partners, to recover the amounts received. In a few States, however, this is partially provided for. Thus DEL. § 7, IND. § 6043, MASS. § 9, MINN. § 14, and WASH. TY. § 2377, provide that suits are to be against the general partners only, except where a special partner is liable for sums withdrawn; and in COL. § 2525, that the recovery of the amounts may be by suit brought by the general partners and special partners entitled to receive any part thereof.

A creditor, however, who has pursued the general partner to insolvency can certainly maintain a suit against the special partner to reach such payments, for the latter holds them as trustee for creditors. *Bell* v. *Merrifield*, 28 Hun, 219; *Wilkins* v. *Davis*, 2 Lowell, 511, 517; s. c. 15 Bankr. Reg. 60, 67.

The rule that any member of the insolvent firm can bring a suit to have assets distributed as a special trust fund, etc.,

cannot apply to a suit to compel a special partner to account for funds withdrawn, the firm being insolvent; for the assets having been given him by the general partners, their title and right to complain have gone, and his title is perfect against all but creditors; and though it makes him a general partner, he can insist that execution be issued against them first and he returned unsatisfied before he is called on to account. *Bell* v. *Merrifield*, 28 Hun, 219, 226.

A creditor who has not pursued the general partner to insolvency, if this be necessary can in an equity court, where both partners must be made defendants, reach these amounts. *Wilkins* v. *Davis*, *supra*.

If the general partner remains solvent and has paid debts, and there is no question of accounting between the partners, and he needs the return of the profits paid to reimburse himself, he can sue the special partner at law to compel him to comply with the partnership contract by repaying them; and his assignee in bankruptcy has the same right. *Wilkins* v. *Davis*, 2 Lowell, 511, 517–8; s. c. 15 Bankr. Reg. 60, 67–8.

In *Coffin's Appeal*, 106 Pa. St. 280 (reversing s. c. sub nom. *Coffin* v. *Gruber*, 14 Weekly Notes, 140), injunction was allowed on behalf of the creditors after insolvency against the enforcement of a judgment confessed in favor of a creditor of the special partner.

A partner *in commendam* having at the dissolution withdrawn his capital, leaving creditors unpaid, a creditor can proceed against him by direct action to recover the proportion he should have paid. The court will take care, however, that the *commendam* fund is not distributed unequally, *La Chomette* v. *Thomas*, 1 La. Ann. 120; or against his executor, *De Lizardi* v. *Gossett*, 1 La. Ann. 138.

The question how to reach the funds was raised but not answered in *Ulman* v. *Briggs*, 32 La. Ann. 657, 663.

CHAPTER II.

ALTERATION.

§ 95. If the partners could by mere agreement between themselves change at will the name, business, membership, capital, shares of each, etc., all the precautions so carefully insisted upon in the statute to inform the public of each of these matters, that no one might be misled into giving credit to the concern as a general partnership, could be set at nought. It would seem, therefore, that a special prohibition to this effect would not be necessary; nevertheless the majority of the States have reinforced the general policy of the statutes by the insertion of a special prohibition, generally in the following language. (For alteration of the name, see also § 59; and for alteration by death, see the Chapter on Dissolution.)

§ 96. **Statutes.** — "Every alteration which shall be made in the names of the partners, in the nature of the business, or in the capital or shares thereof ["capital or shares" omitted in Ohio and Mississippi], or in any other matter specified on the original certificate, shall be deemed a dissolution of the partnership; and every such partnership which shall in any manner be carried on after any such alteration shall have been made, shall be deemed a general partnership ["the partners consenting" shall be liable accordingly, Mississippi] unless

renewed as a special partnership, according to the provisions of the last[1] section."

Ala. § 2075.	Ark. § 4360.	Dist. Col. §§ 502, 503.
Ga. § 1931.	Iowa, § 2158.	
Kan. § 3359.	Md. § 10.	Mich. § 2353.
Minn. § 12.	Miss. § 1019.	N. C. § 3099.
Neb. § 12.	N. H. § 8.	N. J. § 12.
N. Y. § 12.	Ohio, § 3149.	Pa. § 13.
S. C. § 1314.	Tenn. § 1745.	Tex. § 3453.
Up. Can. § 9.	Utah Ty. § 12.	Wis. § 1712.

California, §§ 7507, 7508; Dak. Ty. §§ 1471, 1472; and Wy. Ty. §§ 22, 23, provide that the special partnership shall become a general one if within ten days from the withdrawal of any partner or new partner being received, and a change in the nature of the business or names, a certificate is not filed and published as before, and that a new partner may be admitted by filing a new certificate stating his name, residence, contribution, etc.

Kentucky, § 5, and Mo. § 3405, provide substantially as in the section at head of this chapter; but the knowledge of the special partner is necessary to a liability; so also Miss. § 1019. Mo. § 3410, also speaks of a "change;" but this is a misprint for "charge," as is obvious from the context and from the parallel section (10) in Kentucky.

Virginia, §§ 5, 6, and W. Va. §§ 5, 6. That there shall be a dissolution if there is an alteration in the name, nature of the business, capital by diminution except by losses, or in the ordinary course of business, or an alteration in any other matter specified on the certificate; and if the partnership is continued thereafter, it is general. And on every renewal because of such alteration a certificate shall be made, etc. (as stated under Renewal).

[1] "Last" of course means last preceding section, as was observed in *Andrews* v. *Schott*, 10 Pa. St. 47, 53.

Louisiana, § 2821, if the general partner use his name or an illegal name, the special partner may immediately withdraw his capital, and by publishing notice be freed from responsibility.

Kansas, Michigan, New Jersey, New York, and Pennsylvania provide for a sale of interests by partners to each other, as follows: —

Kansas, § 3359, adds a proviso that any special partner may sell or transfer his share or any part thereof in good faith to any person with the consent in writing of all the members, the consent to be filed with and entered on the firm's books; but the transfer is not to be valid until entered on the certificate of partnership and on the margin of the record.

Michigan, § 2361, provides that no limited partner shall be deemed a general partner by alteration, under § 2353, by one or more of the general partners selling his interest to another general partner or partners or to any other person or persons, nor by reason of one or more of the special partners selling his interest to the other special partner or partners or to any other person or persons, provided that no capital shall be withdrawn so as to reduce it below the sum stated in the certificate, and provided also that within thirty days after such alteration the remaining or succeeding partners make and severally sign a certificate, etc., which, by § 2362, must be published, and by § 2363, liability continues, except as between each other, until the making, filing, and publishing.

New Jersey, in addition to § 12 above, has the following: § 26. "That any special partner, or the heirs or legal representatives of any special partner deceased, may sell his or her interest in the partnership without working a dissolution thereof or rendering the partnership general: *provided*, a notice of such sale be filed within ten days thereafter with the clerk of the county where the partnership is doing business, and the purchaser of such interest may thereupon become a

special partner with the same rights as an original special partner."

PENNSYLVANIA also adds the following: —

§ 14. "The capital of the firm may be increased either by taking in new special partners or new subscriptions of capital from the partners previously in the firm; such increase being made in pursuance of the consent of the partners, as expressed in the original articles of partnership or in any subsequent instrument of writing."

§ 15. "Every such increase of capital shall be duly acknowledged, certified, and recorded; but no neglect in recording the certificate of any such increase of capital, or of any sale or transfer of the interests or shares of the special partners, or any of them, shall be construed to operate as a dissolution of the firm, or to make the special partners liable as general partners."

§ 29 (added in 1858). "The consent of the partners to a sale or transfer, by either the general or special partners, of their respective interests in the partnership, in pursuance of the resolution of the 16th of April, 1838, may be given in advance either in the original articles of partnership or other like instrument, and a sale or transfer of any part or share of the interest in the firm of any partner, if made in pursuance of the articles of partnership or previously expressed consent of the partners as aforesaid, shall be equally valid as a sale of the whole interest of any one or more of the partners. And it shall further be lawful for the general partner or partners, or either of them, to purchase part or the whole of the interest or shares of one or more of the special partners."

NEW YORK, § 12, as amended in 1858, and now in force, is as follows: —

"Every alteration which shall be made in the names of the general partners, in the nature of the business, or in the capital or shares thereof contributed, held, or owned, or to be contributed, held, or owned, by any of the special partners, and the

death of any partner, whether general or special, shall be deemed a dissolution of the partnership, unless the articles of partnership shall specify that in such events the partnership shall be continued by the survivors, in which case it may be so continued with the assent of the heirs or legal representatives of the deceased partner. And every such partnership which shall be carried on after such alteration shall have been made, or such death shall have occurred, shall be deemed a general partnership in respect to all business transacted after such alteration or death, except in case of a provision in the articles of partnership for the continuance of the business by the survivors as aforesaid, in which case the heirs or legal representatives of the deceased partner may succeed to the partnership rights of such deceased partner, and continue the business the same as if such partner had remained alive; provided, however, that one or more special partner or partners may be added to the partnership upon actually paying in an additional amount of capital, to be agreed upon by the general and special partners, and the alteration of the partnership by such additional special partners shall not make the partnership general, nor alter its name, nor work a dissolution, provided the general partners in the partnership name shall file an additional certificate with the clerk, with whom the original certificate may have been filed, verified on oath by one of them, stating the names and residences of such additional special partners, and the amounts respectively contributed to the common stock by them. And any special partner, or the heirs or legal representatives of any such special partner, deceased, may sell his interest in the partnership without working a dissolution thereof, or rendering the partnership general, provided a notice of such sale be filed within ten days thereafter, with the clerk with whom such original certificate of partnership may have been filed, and the purchaser of such interest may thereupon become a special partner, with the same rights as an original special partner."

The following States have no clause relating specifically to alterations, viz.: —

COLORADO.	CONNECTICUT.	DELAWARE.
FLORIDA.	ILLINOIS.	INDIANA.
MAINE.	MASSACHUSETTS.	MONTANA TERRITORY.
NEVADA.	OREGON.	
RHODE ISLAND.	VERMONT.	WASHINGTON TERRITORY.

But several of them have the following sweeping clause:

§ 97. "In all cases not otherwise provided for in this act ["and in all cases in which its provisions are not fully complied with," MASSACHUSETTS] the members of limited partnerships shall be subject to all the liabilities and entitled to all the rights of general partners."

DEL. § 4.	IND. § 6045.	MASS. § 12.
ME. § 10.	MON. TY. § 954.	NEV. § 480.
OREGON, § 10.	R. I. § 14.	VT. § 3699.
WASH. TY. § 2379.		

§ 98. **Loans are not Alterations of Shares.** — A mere loan by the special to the general partner or to the firm is never considered as an alteration of capital or shares, *Walkenshaw* v. *Perzel*, 32 How. Pr. 233; s. c. 4 Robt. 426; *Rayne* v. *Terrill*, 33 La. Ann. 812; In re *Terry*, 5 Biss. 110; even though part of the profits be paid as interest on the loan, — provided, of course, it be not such a sharing of profits as to constitute in itself an act of partnership, *Vilas Bank* v. *Bullock*, 10 Phil. 309, 311; s. c. 1 Weekly Notes, 219. Nor does a loan by the general to the special partner, *Hogg* v. *Orgill*, 34 Pa. St. 344.

Though property of the firm be taken as security, *Lewis* v. *Graham*, 4 Abb. Pr. 106; *Walkenshaw* v. *Perzel*,

32 How. Pr. 233; s. c 4 Robt. 426; In re *Terry*, 5 Biss. 110; and see *Madison County Bank* v. *Gould*, 5 Hill, 309. Nor is the buying up of claims against the partnership an alteration of shares, *Hayes* v. *Heyer*, 35 N. Y. 326, 329.

These acts and transactions when objectionable are to be attacked on other grounds. See under the heads of SPECIAL PARTNER AS CREDITOR, INTERFERENCE, and WITHDRAWAL.

In *Walkenshaw* v. *Perzel*, *supra*, it was held that enlarging the means of carrying on the business by a loan for the purpose of purchasing real estate is not an alteration in the nature of the business or capital.

§ 99. **Participation of Special Partner necessary.**—It has been remarked already that each specification of a forbidden change is of such a kind that the alteration could not be effectuated without the special partner's knowledge, and the conclusion has been drawn that therefore other changes must be made with his knowledge, or they will not have the effect to render him liable as general partner. *Singer* v. *Kelly*, 44 Pa. St. 145, affirming s. c. sub nom. *Singer* v. *Macalester*, 4 Phila. 312.

In *Singer* v. *Kelly*, *supra*, the partnership was formed for a general commission business, and the general partners, without the knowledge of the special partners, bought large quantities of rice and cotton on credit. The court said (p. 147): "The contest is between intelligent action as the ground of liability, on the one hand, and a claimed liability by force merely of the words of the statute, regardless of the element of knowledge, on the other." And on page 148, that if the general partner, without

knowledge of the special partner, could change the nature of the business and make him liable, this would be more severe than if the violation consisted of a change in the firm name or capital, which manifestly could not be done without assent. The rest of the statute implies knowledge, and we may presume the same to be necessary as to this clause.

This conclusion is just, and the reasoning is perhaps not unsound; but it should rather be said that an attempted change in the nature of the business without the special partner's consent would be wholly void, as beyond the scope of the general partner's powers, and therefore no real change, as in *Taylor* v. *Rasch*, 1 Flippin C. C. 385; s. c. 11 Bankr. Reg. 91. And so of a change in the name: not that the name cannot be changed without the special partner's knowledge, but rather that the name, as we have seen, not being, as in general partnerships, a mere symbol, and any other name used for a partnership contract equally binding; but in limited partnerships it is of the essence of the act, and a contract in a new name is not binding as the act of the firm. And a change in the capital or shares refers to the capital or shares specified in the certificate, as is shown by the use of the succeeding words, or any "other" matter specified in the certificate, the word "other" being *ejusdem generis;* and as only the special partner's capital and shares are so specified, he cannot be innocent of an alteration therein.

The certificate is also required to state the places of residence of the special partners. This must probably be regarded as mere *descriptio personæ*, or identifying matter; for it is scarcely supposable that a special partner

will become liable by changing his residence, much less by the change of another special partner's residence.

§ 100. **Consequences not retroactive, when.** — The next noticeable point is that the effect of change is not retroactive. An alteration merely dissolves the limited partnership. It is in the future that the firm is a general one, and the general liability is for acts, engagements, and liabilities incurred while it is thus general after it had ceased to be limited. *Lachaise* v. *Marks*, 4 E. D. Smith, 610; *Singer* v. *Kelly*, 44 Pa. St. 145, 147–8 (affirming, as *Singer* v. *Macalester*, 4 Phila. 312); *Perth Amboy Manufacturing Co.* v. *Condit*, 21 N. J. Law (1 Zabr.), 659. In the latter case James Vanderpool, a special partner in the firm of Condit & Bowles, died, and his cousin, Beach Vanderpool, in whom his interest had vested, took his place. The firm brought suit in the names of the general partners, Condit & Bowles, to collect prior debts. It was urged that the alteration made the partnership general, and that all the partners should have been plaintiffs; but the court held, without passing on the question of whether the death of a special partner is a dissolution, that it was sufficient to say that the liability accrued before the death, and that this section of the statute did not apply to prior transactions.

But if such alteration amounts to an interference, it is governed by other rules. Thus, a sale by the special partner of his entire interest in the firm, before its expiration and without statutory dissolution, to the general partner, he thereafter continuing the business, is an alteration. Whereas a sale by the general partner to the special partner, who thereafter continues the business, is not

only an alteration, but the continuance is an interference. See under INTERFERENCE.

And as a dissolution is not perfected so as to exonerate the partners from liability — at least to those having no actual knowledge thereof — until the statutory time of publication of dissolution has completely expired, as we shall hereafter see (§ 140), it follows that such purchase and sale cannot be safely made until such time.

§ 101. **Sale by one Partner to another of his Interest.** — The rule in general partnerships is that partners have a right by mutual agreement to convert joint into separate assets; as by dividing them, or by the sale of one partner of his interest to another. Creditors cannot interfere with this, as they have no lien on the assets (except, perhaps, in Vermont); and such equity as they have can only be worked out through a partner's assertion of his rights, unless the assets have come under the control of chancery.

In limited partnerships this right to convert joint into separate assets is limited in two ways. If a sale by one partner to another is in contemplation of insolvency, it is void. This will be treated in the chapter on INSOLVENCY. If the sale is not in contemplation of insolvency, it is nevertheless an alteration; and except in those States where it is permitted, the general principle of the statutes makes it a dissolution.

Where one general partner sold out to another general partner with the knowledge and consent of the special partner, and the business was carried on by the continuing partners without a statutory renewal, the partnership is continued as a general one. *Fox* v. *Graham*, Michigan Nisi Prius Cases, 90.

But in New York, where one general partner sold out to another, and finally the latter sold to the special partner, a finding that after the first sale and before the second the special partner did not in any way relinquish his interest, and that the business was, with his consent, carried on in the name of the remaining general partner, was said not to state facts sufficient to render the special partuer a general one; that such facts might exist without such consequence, as being a mere delay, or withdrawing his interest or capital, which would not constitute him a partner. *Wisner* v. *Ocumpaugh*, 71 N. Y. 113, 117.

And the giving of notes payable in the future by the general to the special partner for the purchase of his interest in the firm on agreeing to dissolve, is not, before they are paid, a change, but, at most, an executory agreement or promise never carried out. *Lachaise* v. *Marks*, 4 E. D. Smith, 610, 623.

If such agreement of dissolution by a sale by the special to the general partners, who intend to continue the business, is followed by a legal dissolution under the statute, and no business is shown to have been done in the intervening time, the special partner's liablility is not enlarged. *Ib.*

A sale by the special to the general partner of all his interest in the firm before the partnership has expired and without legal dissolution, and taking as security for the purchase-money a chattel mortgage on the co-partnership effects, and a judgment on which execution was returned *nulla bona*, except as to fourteen dollars, is an alteration in the capital and also in the shares of the co-partnership, since the whole interest of the special partner, which included his contribution to the capital, was turned into a debt against the general partner and a specific lien secured to the special partner upon the firm property, to the exclusion of creditors of the firm, whether existing or subsequent. And if a debt is afterwards contracted without notice of this arrangement, this is "carrying on" the partnership after dissolution within the meaning of the statute; and the

creditor can at his election consider the attempted dissolution as merely void, and enforce his demand against the firm as a limited one carried on after dissolution without record of the fact, or he can treat the transaction as a violation of the provision forbidding alteration, and hold the special as a general partner, although there was no design to defraud creditors. *Beers* v. *Reynolds*, 11 N. Y. 97; affirms s. c. 12 Barb. 288.

§ 102. **Effect of Sale on the Distribution of Assets.** — It is noticeable that although the statute provides that an alteration shall be deemed a dissolution, it does not state the effect on the title of the altered property; and if the alteration is a sale by one partner to another, it does not say that such sale is void or voidable, or that the attempted change of joint to separate assets is not effectual. That the retiring special partner is liable as a general one for the acts of the continuing partner until due publication of the dissolution, is plain; but that the creditors of the prior limited partnership have any priority in the distribution of the assets in equity over the individual creditors of a sole continuing partner, is not so plain. The property after such sale to one partner was held to have become separate property in the only case in which the question was considered. The case was as follows: —

A and G became partners. A afterwards bought out G and then took in U as a special partner in a limited partnership. U afterwards sold out to A, who assumed the debts but died insolvent. On bill to marshal assets filed by A's executrix, it was held by the court below that the creditors of both firms should share equally, and U assigned this as error. In the Supreme Court it was said that the only reason counsel assign

for distinguishing limited from general partnerships in respect to the right to convert the partnership property into the separate property of one, is that in general partnerships the retiring general partner may still be sued, which cannot be done in limited partnerships. "We will not say this constitutes no ground why a different practice should prevail in the two cases. No writer has referred to any such distinction, and no such point has been adjudicated; and under such circumstances we should not feel warranted in making such an innovation." *Upson* v. *Arnold*, 19 Ga. 190.

The report of the case is not clear, for it does not appear how A's executrix came to file the bill. If she asked to avoid the natural consequences of A's act, it might justly have been said that A is estopped to deny the consequences of his purchase. The sale does not appear to have been made in contemplation of insolvency; nor is it shown that there was insolvency in fact, which would have brought the case within the doctrine of trusts, explained in the chapter on INSOLVENCY.

In *First National Bank of Canandaigua* v. *Whitney*, 4 Lansing, 34, given more fully under FRAUDULENT CONVEYANCE, there was a sale by the general to the special partner, who thereupon continued the business in his own name. Yet the point above referred to was not fairly raised. See also *Mattison* v. *Demarest*, 4 Robt. (N. Y.) 161, under FRAUDULENT CONVEYANCE.

§ 103. **Change of Membership at Expiration.** — Where on the expiration of a partnership a renewal is made, but with an additional member, this is an alteration, and therefore by the terms of the statute a dissolution; and as the new firm is not a renewal of the old in such case, the provisions of the statute as to contributing in actual cash must be complied with as in forming a new firm; for the special cash contribution in the former

firm cannot be considered a contribution to the new firm, on account of the debts and assets of the old having been taken. And such would be the rule if the number of general partners were diminished. *Andrews* v. *Schott*, 10 Pa. St. 47.

The following case, which is rather one of withdrawal or of payment of the capital, but published since these chapters were printed, was called also a case of alteration, and is inserted here.

On the day the certificate was signed, at ten A. M., S, the special partner, gave to the firm a certified check on the bank, which the firm then deposited in the same bank, and it was passed to their credit. Between two and three o'clock on the same day the firm gave S its check on the same bank for $6,500, and three days afterwards paid him by another check $1,119.16. Neither the old nor a new firm or either of the general partners had any money in bank out of which to pay the $6,500 check except that derived from S's check for $10,000. Held not a payment of special capital. Paying in the capital and paying it back the next hour is not a contribution; the special partner must leave his capital there to the risks of business. This as a payment is apparent and illusory; it is also an alteration. Nor is the explanation any excuse that, on balancing the books of the old firm, there stood to the credit of S these amounts as his capital and profits; but the assets of the old firm consisted in property and outstanding credits, and the new firm agreed to take them at an estimated valuation. This is not equivalent to cash. (Supreme Ct. Md. 1886.) *Lineweaver* v. *Slagle*, 2 Atlantic Rep. 693.

CHAPTER III.

INTERFERENCE.

§ 104. **Statutes.** — "The general partners only shall be authorized to transact business and sign for the partnership, and to bind the same."

ALA. § 2065.	ARK. § 4350.	CAL. § 7489.
COL. § 2516.	CONN. § 4.	DAK. TY. § 1459.
DIST. COL. § 507.	FLA. § 1.	GA. § 1922.
ILL. § 3.	IOWA, § 2149.	KAN. § 3349.
MD. § 12.	MICH. § 2343.	MINN. § 3.
MISS. § 1014.	NEB. § 3.	N. J. § 3.
N. Y. § 3.	PA. § 3.	S. C. § 1305.
TENN. § 1735.	TEX. § 3444.	UP. CAN. § 3.
UTAH TY. § 3.	VA. § 7, and W. VA. § 7.	WIS. § 1716.
WY. TY. § 10.		

KY. § 2, MO. § 3402, and LA. § 2815, state the opposite; viz., that the special partner has no power to bind or manage.

FLA. §§ 1 and 2, also provides that one or more of the general partners may be designated who alone can sign the name or contract debts, and any of the others violating this is guilty of felony.

§ 105. "A special partner may from time to time examine into the state and progress of the partnership concerns, and may advise as to their management; but he shall not transact any business on account of the partnership, nor be employed for that purpose as agent, attorney, or otherwise; and if he shall interfere contrary to these provisions, he shall be deemed a general partner."

ALA. § 2080, may act as attorney. ARK. § 4365.

CAL. § 7491, DAK. TY. § 1461, and WY. TY. § 12: "A special partner may lend money to the partnership or advance money for

it, and take security from it therefor, and as to such loans or advances has the same rights as any other creditor; but in case of the insolvency of the partnership, all other claims which he may have against it must be postponed until all other creditors are satisfied."

Dist. Col. § 507, about same, omitting all mention of employment as agent, etc.

Fla. § 13, unless employed as agent under a power of attorney, instead of "nor be employed," etc.

Ga. § 1936, may be employed as attorney and counsellor in law and equity.

Ill. § 19, may act as attorney in fact, but shall not transact any other business, nor be employed for that purpose as agent or otherwise, without the express assent of all the general partners; and if he interfere contrary, etc., as above.

Iowa, § 2163. Kan. § 3362.

Md. § 12, exactly same as District of Columbia.

Mich. § 2364, Minn. § 16, N. J. § 25, and N. Y. § 17 (but Michigan omits the last five lines below beginning "He may also"), follow the above form, but insert after the word "management" as follows: "he may also loan money to, and advance and pay money for, the partnership, and may take and hold the notes, drafts, acceptances, and bonds of or belonging to the partnership, as security for the repayment of such moneys and interest, and may use and lend his name and credit as security for the partnership in any business thereof, and shall have the same rights and remedies in these respects as any other creditor might have. He may also negotiate sales, purchases, and other business for the partnership; but no business so negotiated shall be binding upon the partnership until approved by a general partner. Excepting as herein mentioned, he shall not transact," etc.; concluding as above.

Miss. § 1016, "except as attorney and counsellor at law."

Neb. § 17. N. C. § 3104, may act as attorney at law.

N. J. § 17.

N. Y. § 3 R. S., p. 2239, also allows the special partner to lease real estate to the general partners for the purposes of the business on terms agreed on.

Ohio, § 3153, insert after management "he may be constituted and appointed by the general partners the agent of the partnership for the purpose of negotiating sales, making purchases, and transacting other business within the scope of the partnership business, upon disclosing his agency to the person with whom he is doing

business; but unless so authorized he shall not transact," etc.; conclude as above.

PA. § 19. S. C. § 1317, may act as attorney at law.

TENN. § 1750, same as Illinois.

TEX. § 3458, only contains the first two lines, ending at the word "management," and without mention of penalty.

UP. CAN. § 14, word for word with above.

UTAH TY. §§ 17 and 19, omits all mention of agency, and in § 19 provides the same penalty if he concurs in or assents to such violation by the firm or by any partner.

WIS. § 1716.

§ 106. Another common form of the provision generally inserted in the section referring to the partnership name is the following: —

"If he [the special partner] shall personally make any contract respecting the concerns of the partnership with any person except the general partners, he shall be deemed and treated as a general partner."

CAL. §§ 7490, 7491, DAK. TY. §§ 1460, 1461, and WY. TY. §§ 11, 12, that the special partner may at all times investigate and advise, with the provisions as to lending and taking security already stated in §§ 7501, 1468, and 19 respectively. If he wilfully interfere in the business or join or assent to any act in violation, he is liable as general partner; but in case of unintentional violation is only so liable to a creditor actually misled.

CAL. § 7502, DAK. TY. § 1470, and WY. TY. § 20, provide that one giving or receiving a memorandum of the contract on making it, stating that the partnership is special, and giving the names, is not chargeable as general partner for defects in its creation.

COL. § 2523, the entire provision is "If he shall contract for said firm respecting its business, he shall be deemed and treated as a general partner."

CONNECTICUT has no provision. Section 4, however, provides that the firm is liable for the acts of general partners only, and they only shall transact business, with a penalty of general liability in § 5.

DEL. § 4. IND. § 6039.

KY. § 7, and MO. § 3407, add "or transact any business . . . as agent or otherwise."

LA. § 2820, business must not be carried on by his agency as agent or attorney; if he "shall take any part in the business of the partnership," he shall be liable as a general partner.

MASSACHUSETTS has no provision except the general clause at § 97, *supra*.

ME. § 6. MICH. § 2354.

MON. TY. § 948, no penalty, and sentence incomplete.

NEV. § 474. N. H. § 6. R. I. § 8.

OREGON, § 6, and WASH. TY. § 2375, add at the end of the above, "in relation to such contract unless he makes it appear that in making such contract he acted and was recognized as a special partner only."

VA. § 7, and W. VA. § 7: "The general partners only are authorized to make a contract (with others than partners) respecting the concerns of the partnership or to transact its business . . . or if he shall make any such contract or transact business for the partnership as agent or otherwise, he shall be liable as a general partner; but this section shall not prevent him from examining into the state of the business and advising as to its management."

VT. § 3695, adds "in relation to such contract unless he notifies such person at the time of making such contract that he acted as a special partner only."

§ 107. **Reason of the Prohibition.** — The scrupulous aim of the statute down to the present point is as we have seen, — First, to give the public and those dealing with the firm exact knowledge of the status of the special partners, by a permanent record of the fact and of the capital, etc., of each, and attested with the solemnity of an oath, and widely published, and by forbidding any change of this status; and Second, to exclude all from other and less particular and accurate information by rigorously suppressing all appearance of the names of the special partners, or allowing them only when accompanied by cautioning words.

When we now reflect how almost surely a person found acting with the firm, engaging in its business, directing its employees and enterprises with the authority of a partner, will be learned by inquiry and by inference to be such, and the information will be unaccompanied by the qualification that he is only a special partner, the closing of this source of error by prohibiting such partial and misleading appearances seems a necessary additional measure to protect third persons and to maintain the policy and secure the benefit of the prior precautions. The reason and necessity, as well as the measure, of this section of the statute thus become apparent.

§ 108. But an examination of the cases shows that this is not the only reason. The public are entitled to have the business conducted under the uncontrolled judgment and skill of the general partner; for they may not have been willing to trust the firm where the general partner or the business is governed by the special partner. Doubtless this is the reason why the special partner is liable *in solido* for an interference, even if it be secret and unknown to the public.

Regrets have been expressed by eminent jurists that the restraint imposed by such onerous penalties on participation by the special partner had not been relaxed to encourage the engagement of capital by those who would withhold its investment unless they could have a voice in its management; see BERMUDEZ, C. J., in *Ulman* v. *Briggs*, 32 La. Ann. 657, 660–1.

But in view of the above considerations, the wisdom of these regrets is doubtful, and the foreign law, notwithstanding the great superiority so urgently and

ceaselessly claimed for it by Troubat over the hardships of the American system of limited partnerships, visits with the most inexorable severity the least *immixtion* by the *associé commanditaire*.

§ 109. **When and to whom applicable.** — It follows from the above reason of the clause that the prohibition relates to the special partner or his representatives alone, and is not to be extended to another firm in which such special partner is a general member. It is competent for such latter firm to transact business with or on account of the limited partnership, or be employed by it as agent, attorney, or otherwise. Per Davies, C. J., in *Hayes* v. *Heyer*, 35 N. Y. 326, 330–1.

Hence also the disability applies only to an existing firm, and does not extend beyond its duration; for then the presence and intervention of the special partner cannot mislead. Hence after dissolution a special partner who receives possession of the assets of the firm in order to wind it up is not thereby made liable to the responsibilities of a general partner; see § 169.

And the same reason was given for holding that a purchase of claims against the firm by the special partner after dissolution was not transacting any business on account of it, for none of the evils intended to be guarded against could arise therefrom. As where obligations of the firm were given before dissolution, and after dissolution the special partner procured another person to take up such obligations on his guaranty, and on their non-payment by the general partners he paid them himself. *Hayes* v. *Heyer*, 35 N. Y. 326, 329–330.

So where after dissolution the special partner, claiming that the assets were being fraudulently appropriated, brought suit for

an account, injunction, and receiver, and subsequently compromised the suit, receiving securities belonging to the firm in full of all claims, this is not an interference. *Pusey* v. *Dusenbury*, 75 Pa. St. 437.

§ 110. **May examine State and Progress.** — The special partner in exercising this right may be at the office, at the mine, manufactory, or store, etc., may examine the books, may be present to see how the works progress, consult with his co-partners in reference thereto, inquire of the agents and clerks, etc. *McKnight* v. *Ratcliff*, 44 Pa. St. 156, 162–3.

§ 111. **May advise.** — The right to advise seems to be merely a right to consult. No consequence follows the neglect of the advice, and no power to vote or to be counted so as to constitute a majority in settling the policy of the firm is given, and does not apparently exist, for it would amount to a control; and any reservation or assumption of control, as will be seen, is a violation of the statute.

The existence of the right to examine and advise was mentioned in *Madison County Bank* v. *Gould*, 5 Hill, 309, 312, and *Ulman* v. *Briggs*, 32 La. Ann. 657. Being actively concerned in negotiating and purchasing real estate for the firm is going beyond mere advising, and is a violation. *Madison County Bank* v. *Gould*, 5 Hill, 309, 313.

A stipulation was made in the partnership articles that the son of the special partner should keep the books and have general supervision of the business at a salary of $1,500 per annum. That the general partner should sign no note or check without the son's knowledge and approval was held to be a

fatal defect; for if it be conceded that the special partner could appoint a supervising clerk, yet the powers of his son went far beyond oversight, for he controlled even the money, the special partner through the clerk retained his grasp upon it, and the general partner was but a clerk, instead of being "the only one authorized to transact business," and the special partner through his appointee was the directing manager of the firm. *Richardson* v. *Hogg*, 38 Pa. St. 153.

§ 112. **Transacting Business or making Contracts.** — The prohibition against transacting any business on account of the firm seems to be equivalent to forbidding the acting as a partner, or, as expressed in some of the statutes, making any contract respecting the concerns of the partnership with any person except the general partners.

Thus, agreeing on a dissolution and settling its terms do not constitute an interference with the conduct of the business. *Lachaise* v. *Marks*, 4 E. D. Smith, 610, 626.

Thus, taking the title of a purchase of real estate in the names of all the partners, including the special partner, would be an interference by the latter in the business of the firm rendering him liable as a general partner, unless, however, there is no evidence from which it can be fairly inferred that he had anything to do with the purchase or conveyance. If his name was included without his knowledge or consent, he would not be liable, and his participation, it was held, must be shown. *Madison County Bank* v. *Gould*, 5 Hill, 309.

It was said in the same case that if he go beyond advising and is actively concerned in negotiating and making a purchase of real estate, he violates the statute. *Ib.* 313; and see *Lewis* v. *Graham*, 4 Abb. Pr. 106.

But where the statute, as in California, Dakota, Michigan, Minnesota, New York, and Wyoming Territory, allows him to take security from the firm for a loan to it, if the firm have contracted to buy certain real estate, and he loans them the money for the purpose, taking the title by their consent in his own name as security, and giving the mortgage to secure the deferred purchase-money, the firm agreeing to repay him before expiration of the partnership and to pay taxes, insurance, and interest on the mortgage, this does not make him a general partner. *Walkenshaw* v. *Perzel*, 32 How. Pr. 233; s.c. 4 Robt. 426; and see In re *Terry*, 5 Biss. 110; below, p. 139.

A special partner who causes or is a party to the transfer of all the assets of the firm, which was insolvent, to one creditor and makes a contract with him as to their disposal and in regard to the payment of the partnership debts, becomes liable as a general partner for violation of the clause forbidding his making any contract except with the general partner, *Farnsworth* v. *Boardman*, 131 Mass. 115.

A special partner's influencing the general partner to leave the State, which is an act of bankruptcy by the latter, is not by the former, In re *Terry*, 5 Biss. 110.

The same case also holds that the special partner's giving a judgment note with other persons to a third person does not affect his partnership liability; but the case is so meagrely reported, in failing to show what the note was for, or whose creditor the third person was, that the meaning of this ruling is not visible to the naked eye.

A purchase by the special partner, before the termination of the partnership, of the entire interest of his co-partners, and continuing the business in his own name, renders him liable as a general partner not only for subsequent, but for prior debts. This is an interference with the firm business contrary to § 17, for it not only terminates the partnership, but devests the general partners of all title and takes it to himself; after such

interference there can be no transactions of the firm to which this provision of the statute could apply. Any other construction would place creditors of the firm wholly at the mercy of the special partner; for if the firm is solvent, all the special partner has to do to defeat the claims of creditors is to buy the property and take the business from the hands of the general partners, and if they are irresponsible, the creditors would be deprived of remedy. *First National Bank of Canandaigua* v. *Whitney*, 4 Lansing (N. Y.), 34.

§ 113. If the interference consists in assuming the direction of the business, and thus practically reducing the general partners to the position of clerks or employees, this is an interference and forfeits the protection of the statute, although it may not be apparent to creditors. *Whittemore* v. *Macdonell*, 6 Up. Can. C. P. 547, 552.

In the following partnership, which caused a number of litigations, Bowes, one of the special partners in a limited partnership formed to operate steamboats as a common carrier, gave written instructions to the boats' officers to carry certain passengers free of charge and others at half price, and as chairman of a board of directors formed to manage the company's affairs, had ordered the painting of one of the steamers at certain rates per day. The court said these acts were done in the "transaction of business on account of the partnership;" but that if these were trifling matters, yet when Bethune, the general partner, was in England and left a clerk here to manage, the committee of special partners, of which Bowes was chairman, did not merely advise as to the management, but also resolved on measures and directed their execution and managed the business through such clerk; and this was held not to constitute advising, but superintending and directing, and forfeited the

protection of the statute. *Bowes* v. *Holland*, 14 Up. Can. Q. B. 316; *Hutchison* v. *Bowes*, 15, *ib.* 156; *Davis* v. *Bowes*, 15 *ib.* 280; and see *Whittemore* v. *Macdonell*, 6 Up. Can. C. P. 547.

§ 114. But acts other than as a partner cannot mislead and do not extend the liability; thus the special partner may deal with the firm as a stranger. Transactions between the firm and the partner may be fraudulent in fact as to creditors, but there is no disability imposed as matter of law.

We have already seen (§ 98), in the chapter on ALTERATION, that loans may be made by the special partner of the firm.

He can sell to and buy from it, so long as he does not act in a manner in which a partner only could act. *Rayne* v. *Terrell*, 33 La. Ann. 812.

There is no law which prevents the special partner from selling to the firm or buying from or dealing with it. *McKnight* v. *Ratcliff*, 44 Pa. St. 156, 167; *Metropolitan National Bank* v. *Sirrett*, 97 N. Y. 320, 328; s. c. 15 Abb. New Cas. 318, 327–8.

On the special partner's making a loan to the general partner and taking as security a bill of sale on certain of the partnership goods, possession of which was delivered to him, the proceeds to be applied to the loan and the excess to a former loan, was held under the Michigan act not to make him a general partner, on the ground that it was the firm's business to buy and sell such commodities; and as to all other transactions except his capital, the special partner could buy and sell like any third party. In re *Terry*, 5 Biss. 110; and see *Walkenshaw* v. *Perzel*, 32 How. Pr. 233; s. c. 4 Robt. 426; *supra*, § 112.

A special partner can be a purchaser on his own account at a sale by the firm of goods pledged to it as collateral, for he has no duty to perform as to the debt or the bailment. But he could not direct or aid in the sale, for that would be an interference which would render him liable as a general partner. *Lewis* v. *Graham*, 4 Abb. Pr. 106.

The acquisition by the firm of a right or property interest owned by the special partner might be in the highest degree to the benefit of the firm, or even essential to its success. If the firm was formed for the purpose of making such purchase, if there was an antecedent binding agreement to do so and pay out of the firm's funds, the payment could not be upheld as in good faith, nor would the special partner's contribution have been in actual cash; for it would be a restriction on the general partner's control and liberty in its use, and a practical appropriation of it in advance. But if there was a mere expectation or understanding in advance that such purchase would be made, but no binding agreement depriving the general partners of their liberty to disregard and repudiate the understanding, then the purchase and payment are in effect a transaction after the firm was organized, and not the consummation of a prior contract. *Metropolitan National Bank* v. *Sirrett*, 97 N. Y. 320, 328–9; s. c. 15 Abb. New Cas. 318, 329–30.

The converse of the above cases is not true. The general partner cannot deal with the firm; he is like a trustee, and cannot make a secret profit out of his agency. Thus, where a general partner appointed manager furnished the partnership goods out of his own store, on which he charged the usual trade profits, it was held that *prima facie* the transactions could not be sustained. *Patterson* v. *Holland*, 6 Grant's Ch. (Up. Can.) 414 (reversed on other points in 7 *ib.* 1).

§ 115. **By Executors.** — Where the partnership articles provided that the death of the special partner should not

dissolve the firm, and a person who had agreed, before the death, to deliver coal to the firm, on inquiring of the executors of the special partner as to further delivery, was told by one of them that they were going on with the business just the same, and desired the continued delivery, and that he should be paid, but that they could not pay until the estate was settled: it was held that this did not bind them personally, the language that they could not pay until the estate was settled showing that no payment except out of the estate was intended. *Richter* v. *Poppenhausen*, 42 N. Y. 373; 9 Abb. Pr. (N. S.) 263.

§ 116. **Representations.** — Representations to a third person by the special partner are rather in the nature of holding himself out as partner — as in the law of ordinary partnerships — than interferences, and if they amount to an estoppel, he is liable to that person, but to none other; and if they do not amount to an estoppel, he is not liable at all.

Advising a third person that the firm is all right is not a participation in, or interference with, its business. *Ulman* v. *Briggs*, 32 La. Ann. 657.

But a special partner making representations to third persons of such a kind as to lead them to suppose he is liable as a general partner, whereby they are induced to sell goods to the firm, makes him liable for such purchases. *Barrows* v. *Downs*, 9 R. I. 446. Or where the special partner, on giving to his individual creditor a note of the firm in payment of his own debt, informs the creditor that he has an interest in the firm, he is made liable as a co-maker thereby, where the representation conveys the inference that he is a partner. *Watts* v. *Taft*, 16

Up. Can. Q. B. 256. But the declarations of his co-partners that he is the moneyed man of their firm cannot involve him. *McKnight* v. *Ratcliff*, 44 Pa. St. 156, 167.

§ 117. **Acting as Agent, etc.** — "Nor be employed as agent, attorney, or otherwise." Several of the statutes, as shown above, allow the special partner to act as agent for the firm in certain capacities, as attorney-at-law, or under certain restrictions, as where he is under a power of attorney, or is with the express assent of all the general partners.

In Pennsylvania it was said *arguendo* that "there is no law which prevented him from selling potatoes or truck-wheels to the firm, or buying coal from them. . . . There is no law against his doing an occasional act or errand for the firm; this is not the kind of agency the act prohibits. . . . The statute is quite strict enough to leave its provisions of any practical value." *McKnight* v. *Ratcliff*, 44 Pa. St. 156, 167.

The consequences (§ 107) which led to the adoption of the section would not follow from employment as attorney-at-law for the firm, for, as seen in §§ 19, 65, limited partnerships are almost wholly confined to trading and manufacturing occupations, with which a lawyer's calling brings him into no personal contact except as adviser. It would seem, therefore, that the mischiefs designed to be averted by the statute would not lead to including by the word "attorney," in § 105 above, an attorney-at-law when he is a special partner. Such special partner's employment would be as adviser or in conducting litigation which he has no hand in producing; neither of which holds him out as partner,

and would no more be the acts of a partner than would those of an architect remodelling the factory of a firm in which he was special partner, provided the general partners and not he ordered that the work be done. The painting of the steamer in the case cited in § 113 was ordered by the special partner, and is therefore not in point; had the special partner been a painter employed to do painting ordered by the general partner, it would have been parallel to the employment of the lawyer to conduct a suit, and it would not, to my mind, have been an interference, where painting or litigating is not the business for which the firm exists.

§ 118. **Consequences.** — Where the interference consisted in actively participating in negotiating a purchase of real estate, the court said the consequent general liability would certainly arise, "so far as related to a liability of the firm growing out of the particular transaction, and we think as to all the debts and liabilities of the firm;" for the statute has forbidden all active participation, upon pain of losing protection as a special partner. *Madison County Bank* v. *Gould*, 5 Hill, 309, 313.

This case was cited as an authority by the general term of the Supreme Court of New York in 1871, in holding that an interference by a purchase by the special partner before the termination of the partnership of the entire interest of his co-partners, and continuing the business in his own name, rendered him liable as a general partner not only for subsequent, but also for prior debts; for as he had all the assets, the creditors on any other construction would be interfered with, since

the general partners alone could sue and be sued, and if the latter were insolvent, the remedy would be defeated. *First National Bank of Canandaigua* v. *Whitney*, 4 Lansing, 34.

So in Massachusetts, under the law prior to 1873, where the special partner's interference consisted in being party to a transfer of all the assets to a creditor with whom he made a contract as to their disposal, and in regard to the payment of debts, the court, in holding that he was liable to all the other creditors, necessarily referred to existing, and not to subsequent creditors, for there were no new contracts. *Farnsworth* v. *Boardman*, 131 Mass. 115.

Interference was held not to retroact to create liability for a tort by the Supreme Court of Pennsylvania in 1863. In that case the defendants constituted a limited partnership in working a mine. Some of its workmen, to protect themselves from a freshet, obstructed the channel of a stream, thereby inundating the plaintiffs. The partners were sued as individuals liable for trespass by their agents acting within the scope of authority, and it was claimed that subsequent interferences by McKnight, the special partner, had made him liable as an individual for the trespass. The Supreme Court held that he is not sued as partner, but as trespasser sought to be established through his relation as partner; that liability ensues to general partners for the act of one, because it is the act of all within the routine of business, and the assent of all to it is therefore presumed; and that the act of one who is not a general partner, but by conduct having no relation to and not establishing the trespass against him, has made himself liable as a general partner for the firm debts, raises no presumption that he had assented to the trespass complained of, occurring in a management from

which he was by law excluded. *McKnight* v. *Ratcliff*, 44 Pa. St. 156.

This reasoning is sound; but if there is a defect in it, it is that the partners' liability for the tort of one partner is not because of a presumed assent arising from the act being in the conduct of business, but because they received the benefit of it.

§ 119. Ceasing to interfere does not restore the protection of the statute. A special partner who has once rendered himself liable to be deemed a general one, stands thenceforward upon the same footing as the other general partners; see ROBINSON, C. J., in *Hutchison* v. *Bowes*, 15 Up. Can. Q. B. 156.

§ 120. In *Hogg* v. *Ellis*, 8 How. Pr. 473, 474, it was said *arguendo* that the special partner as between himself and the other partners had a right, unless restricted by the articles, to take an active part in the management, subject only to the consequent general liability to creditors (see further page 91 above).

CHAPTER IV.

RENEWAL.

§ 121. **Statutes.** — "Every renewal or continuance of such partnership beyond the time originally fixed for its duration shall be certified, acknowledged, and recorded, and an affidavit of a general partner be made and filed, and notice be given in the manner herein required for its original formation; and every such partnership which shall be otherwise renewed or continued, shall be deemed a general partnership."

Ala. § 2074.	Ark. § 4359.	Del. § 3.
Dist. Col. §§ 500, 501.	Ga. § 1930.	Ill. § 11.
	Ind. § 6038.	Iowa, § 2157.
Kan. § 3358.	Mass. § 7.	Md. § 9.
Me. § 5.	Mich. § 2352.	Minn. § 11.
Miss. § 1018.	Mon. Ty. § 947.	Neb. § 11.
Nev. § 473.	N. J. § 11.	N. Y. § 12.
Ohio, § 3148.	Oregon, § 5.	Pa. § 12.
R. I. § 6.	S. C. § 1313.	

Tenn. § 1744, but by 1756 *a*, publication is made unnecessary.

Tex. § 3452.	Up. Can. § 8.	Utah Ty. § 11.
Vt. § 3694.	Wash. Ty. § 2374.	Wis. § 1711.

Several of the above forms are not in the above language, and those which are in the above language omit the requirement of an affidavit where no affidavit is required in the original formation of the partnership.

Cal. § 7485, Dak. Ty. § 1457, and Wy. Ty. § 9, which are alike, contain the usual requirements, but omit any specific mention of a penalty.

Colorado and Louisiana are entirely silent on the subject, and Fla. §§ 6, 19, 20, mentions original "or renewed" articles, but

nowhere provides for a renewal; and FLA. § 20, it seems, permits a provision in the renewal that death shall not dissolve, although the original was silent as to this.

CONNECTICUT, Laws of 1882, p. 122, Act of March 9, 1882, requires the sworn certificate to state whether the "special capital has been reduced or impaired since the last certificate, and if so, to what amount;" otherwise the statute contains the usual elements.

KY. § 6, and MO. § 3406, are the same as the above; KENTUCKY omitting to state the consequences, and both adding, "except that there need not be any repayment of the cash capital advanced by the special partners." MISSOURI also adds that the new statement must set out that the books have been balanced and the profit and loss ascertained, and the amount to the credit of each special partner after considering only the assets esteemed good and an affidavit of these matters.

N. C. § 3098, same as the above, but adds a provision as to the original capital being represented by goods and merchandise on hand and unimpaired.

N. H. § 9, is like the rest; but an amendment of July 14, 1879, Laws, p. 337, provides that a renewal be within thirty days after the expiration.

VA. § 6, and W. VA. § 6, allow a statement that the capital was contributed at the time of the formation of the partnership, giving the year, and state no penalty.

CALIFORNIA, CONNECTICUT, DAKOTA TERRITORY, KENTUCKY, MASSACHUSETTS, MISSISSIPPI, and WYOMING TERRITORY omit to state that the penalty for non-compliance is a general liability.

§ 122. **Ambiguities in the Statute.** — Considering how utterly inadequate in its instructions this section of the statute is, it is astonishing that there have been no more decisions upon it. The statute requires the renewal to be certified, etc., as in the original formation. As the certificate of formation certified a cash contribution or in specific articles at a valuation, it is obvious that a literal compliance with the statute is impossible, and no instructions are given to guide us.

§ 123. Where there is no provision for a renewal, it may be fairly supposed that a new partnership with new capital is necessary to a further relation as partners, without awaiting the winding-up of the old or the distribution of its assets, perhaps even where a contribution in goods is allowed, since the new term is not a continuation of the old, but a new partnership.

§ 124. The consequence of not so renewing, — viz., that the partnership shall be deemed a general one, — clearly applies to future, and not to past acts; that is to say, if the partnership is continued with the consent of the special partners, this is not an interference, the penalty for which may relate to existing debts, but there is no longer a limited partnership as to future transactions.

§ 125. **Interval before Renewal.** — If the renewal, instead of being made at the expiration of the original term, is after an interval of some days, thus breaking the continuity of the partnership, the question arises whether it is a renewal or a new partnership; for if the latter, it is not a limited partnership, because the capital has not been paid in anew, and for other departures from the statute. In *Andrews* v. *Schott*, 10 Pa. St. 47, it was said that the parties during such interval, if partners at all, were general partners; but the renewed partnership being by reason of an alteration in the number of partners a general one, nothing further was ruled. But in the Common Pleas in 1885, where there was an interval of six days between the expiration and renewal, but no business appeared to have been done, and it was urged that on that account the partnership was not a renewed limited one, but a new and therefore

general partnership, the court held that no ground was shown to hold the special as a general partner. *Hirsch* v. *Vanuxem*, 15 Weekly Notes (Pa.), 467. In the interval, however, the partnership is general if any business is done, and the special partners are liable for all debts contracted during that period. *Haddock* v. *Grinnell*, 1 Atl. Rep. 174; *Grinnell Manufacturing Corporation* v. *Haddock*, 16 Weekly Notes (Pa.), 96.

§ 126. **Alteration at Renewal.** — If there is an alteration on the renewal, — as by adding a partner or otherwise, — it is not the same partnership, but a new, and therefore a general, one. *Andrews* v. *Schott*, 10 Pa. St. 47. It was suggested in that case that the assets of the old firm would belong to the old creditors; but that is doubtful. If the alteration was by the withdrawal of a partner, he would have a lien to compel the assets to be applied to the debts; but if the alteration was by the addition of a partner, the creditors of the old firm would have no one through whom to obtain a lien. See § 101 *et seq.*

On the day following the expiration of a limited partnership in which the special partner's capital was $5,000, the partners recorded and published a certificate stating that they had formed a limited partnership, etc., giving the same name and business, — "a general commission business," — and that the special partner had contributed $10,000. It was urged that this was a renewal. The court do not decide on the sufficiency of the certificate of renewal, but hold that the change of capital makes it a new partnership, and that such also would be the conclusion of any one reading the publication of the terms. (Supr. Ct. Md. 1886) *Lineweaver* v. *Slagle*, 2 Atl. Rep. 693.

§ 127. **Certificate and Affidavit.** — It is conceded in all practice that the certificate and affidavit of renewal are not expected to follow the original; for if that were required, a new cash capital would be necessary, and the renewal would not differ from a new partnership. The difficulty is to know how minute must be the information to be contained in these documents.

A going business is often not susceptible of exact estimate as to its own standing, capital, etc. Its standing of one day is not its standing of the next day, not only because new contracts may be made and old ones completed, and new debtors and creditors created, but because the ebb and flow of markets make the value of the stock a constantly fluctuating amount; and unseen changes in the ability and solvency of those indebted to the firm may affect it to a high degree without any of the partners being at all aware of any change. Moreover, the capital which originally was cash is no longer so; it has now become a stock of goods, or improvements, or property and credits. It is perfectly plain that the renewal certificate cannot state that there is a present cash capital, nor its accurate value. It would therefore seem that the statute should be construed as allowing a renewal, regardless of the condition of the association; that the statutory certificate, record, affidavit, and publication need contain no new matter not in the original certificate, except the statement that the partnership is renewed for a certain further time; and that any other matter analogous to the re-recording of a mortgage of personalty is practically a re-statement of the original facts. Such, judging from the statements of facts in the cases of renewals, had been the practice.

Nevertheless, of two very late cases — or rather the only two on the subject — both seem to confine the right to renewal to partnerships whose capital is not impaired, and deny it to a partnership whose capital is diminished; and one case seems to require in the documents of renewal a very difficult degree of detail.

The New York case holds that if there is no evidence of the impairment of the special partner's capital affording ground for anything but a mere conjecture that such fact existed, a jury was warranted in finding the limited liability preserved, and that it was a question of fact, *Metropolitan National Bank* v. *Sirrett*, 97 N. Y. 320, 332; s. c. 15 Abb. New Cas. 318, 333.

But in the Supreme Court of Pennsylvania, in a case decided very recently, where the affidavit on renewal was to the effect that the special capital stated to have been originally paid had been so paid and remained in the common stock, it was held that this was not sufficient, for the intent of the statute was to have creditors informed of the state of the partnership, and that the affidavit should state in what shape such contribution remains in the common stock. "Is it in cash, in merchandise, or does it represent bad debts, a margin in stock, or a speculation in real estate? The creditors are entitled to know, when the partnership is renewed, whether the special capital is a reality or a myth, whether it is in a shape to respond to their claims. It may never have been drawn out by the special partner, the affidavit may truly say it remains in the common stock of the firm; yet it may be in such shape as to be of no more value to creditors than if drawn out by the special partner." "The affidavits shall give as full

information upon the renewal as upon the original formation of the partnership." "When a special partnership is continued or renewed, it must be in the same condition, so far as the special capital is concerned, as when it was originally formed. Such capital must be unimpaired; it must be in such condition as to be available for creditors; and it is the duty of the general partner to furnish this information in his affidavit." *Haddock* v. *Grinnell Manufacturing Corporation*, 1 Atl. Rep. 174 (affirming s. c. 16 Weekly Notes, Pa., 96).

§ 128. The requirement that the general partner make the affidavit is not satisfied by an affidavit by the special partner, which will be considered as mere surplusage and disregarded. *Hirsch* v. *Vanuxem*, 15 Weekly Notes, 467; *Haddock* v. *Grinnell, supra;* but making it is not an interference by him, *Hirsch* v. *Vanuxem, supra.*

PART III.

TERMINATION OF THE PARTNERSHIP.

CHAPTER I.

DISSOLUTION.

§ 129. **Statutes.** — "No dissolution of such partnership by the acts of the parties shall take place previous to the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of dissolution shall have been filed and recorded [" and recorded " omitted in UPPER CANADA] in the recorder's office in which the original certificate was recorded, and published once in each week for four weeks in a newspaper in each of the counties where the partnership may have place of business, and in the State paper."

This section, with proper modifications as to the office in which the record is to be made, and the duration and extent of publication, is in all the statutes except CONNECTICUT. It is in the above general form in, —

ALA. § 2087. ARK. § 4372.
DIST. COL. § 517; see 2, below.
FLA. § 19; see 3, below. GA. § 1943.
IOWA, § 2170. MD. § 21; see 7, below.
MINN. § 21. N. C. § 3108. NEB. § 24.
N. H. § 10. N. J. § 24. N. Y. § 24.
OHIO, § 3159. PA. § 26. S. C. § 1324.
TENN. §§ 1756, 1756 *a*; see 8, below. TEX. § 3464.
UP. CAN. § 17. UTAH TY. § 21. WIS. § 1723.

OHIO, § 3154, also provides that dissolution may be had in the same manner and for such frauds and mismanagement as furnish sufficient ground for the dissolution of other partnerships formed for a definite period.

The following contain the same requirements, but begin "no dissolution except by operation of law shall," etc.

COL. § 2526.	DEL. § 8.	
ILL. § 12; see 4, below.		IND. § 6044.
KAN. § 3366.	KY. § 11; see 5, below.	
MASS. § 10.	MICH. § 2359.	
MO. § 3411; see 5, below.		MON. TY. § 953.
NEV. § 479.	OREGON, § 9.	R. I. § 13.
VA. § 11.	VT. § 3698.	WASH. TY. § 2378.
W. VA. § 11.		

1. CAL. § 7509, DAK. TY. § 1473, and WY. TY. § 24, that the partnership is subject to dissolution the same as a general partnership, but the dissolution is not complete until the filing, recording, publishing, etc.

2. DIST. COL. § 517, no dissolution by act of the parties except by death or insolvency of the partnership or of one of the general partners.

3. FLA. § 20, no dissolution by death of one or more special partners or of one general partner, if there are more, unless the articles so provide.

4. ILL. § 13 (also §§ 4, 12, 14), the articles may provide what in case of the death of any of the general partners shall be the rights of their heirs and legal representatives, upon what contingency such death shall be a dissolution, and how the business shall be carried on thereafter.

§ 14. When it is provided in the articles and certificate that the death of a general or special partner shall not work a dissolution, the surviving partner shall continue the business as provided in the articles. The heirs and legal representatives of a deceased general partner, unless otherwise agreed, shall stand in the same relation as a special partner, with the same rights and no greater liabilities.

§ 15. Nothing in this act shall be construed to prevent dissolution at any time on account of fraud or misbehavior of any partner, nor to prevent the compelling of an account or the protecting the rights of any parties in a competent court.

5. KENTUCKY and MISSOURI, no dissolution of such partnership except by its terms or operation of law, etc.

6. ME. § 9, and MISS. § 1020, begin thus: "No voluntary dissolution," etc.; and the latter provides that any special partner may compel dissolution in the manner and for the causes that authorize a court of equity to dissolve a general partnership.

7. MD. § 21, no dissolution by act of parties before time, etc., except in case of death or the insolvency of the partnership.

8. TENNESSEE, by § 1756 *a*, no publication is necessary.

CONNECTICUT and LOUISIANA are silent on the subject of dissolution, except that LA. § 2821 provides that if the general partner use his name or an illegal name, the special partner may immediately withdraw his capital and publish dissolution.

KANSAS, MICHIGAN, NEW JERSEY, NEW YORK, and PENNSYLVANIA have provisions relating to one partner selling out to another, which will be found under ALTERATION.

§ 130. **Causes of Dissolution.** — A limited partnership is dissolved by the same causes which suffice to dissolve a general partnership so far as applicable, and the phrase dissolution "by operation of law" may be assumed to mean by these causes and by decree in equity for cause.

A general partnership is dissolved *ipso facto* by death of one partner; bankruptcy or declared insolvency of one or of the firm; execution on one partner's interest; sale or assignment of one's entire interest; war, when the partnership involves trading between hostile states if intercourse is forbidden; marriage of a *feme-sole* partner, except in the few States providing the contrary, if she is the general partner, though no reason is apparent why such be the result if she is a special partner. While other facts — as insanity, crime, hopelessness of success, misconduct — are grounds of relief in equity on the application of a partner not primarily or conspicuously in fault where the partnership is not at will, and therefore cannot be dissolved without mutual consent.

§ 131. — **by Limitation.** — This falls, unlike the expiration of a general partnership by time, within the class of dissolutions by operation of law. At expiration all power in the partners to act for each other ceases, as in general partnerships; but, unlike general partnerships, no notice is necessary, neither an actual notice to former dealers, nor a general notice to the general public, but all must take notice of this period.

Thus, where after expiration the general partners continue to give notes in the name of the firm, *bona-fide* holders of such notes cannot participate ratably with creditors of the firm in the assets, nor can they ask a receiver, *Haggerty* v. *Taylor*, 10 Paige, 261. And the same case holds that if the special partners have made themselves personally liable by carrying on the business after expiration, the remedy is an action at law against them individually, and not by asking a receiver.

§ 132. — **Bankruptcy or Insolvency.** — Bankruptcy or insolvency of the general partner or an assignment in insolvency is a dissolution *per se*, as in general partnerships, *Wilkins* v. *Davis*, 2 Lowell, 511, 516; s. c. 15 Bankr. Reg. 60. This subject is more fully considered under § 162. Some of the statutes, as in the District of Columbia and Maryland, specially provide that insolvency dissolves, but seem to exclude the insolvency of a special partner. It is not probable, however, that any fund will be ruled to be withheld from creditors by its being put into a partnership in the case of a limited any more than in a general partnership; and in the latter case it is perfectly settled that the contract to leave the fund in a partnership does not prevent dissolution.

§ 133. — **Abandonment.** — A desertion of the partnership by the general partner and his leaving the State was held to be a dissolution *ipso facto*, and the special partner who proceeded to take charge of and wind-up the concern without statutory notice of dissolution was therefore not guilty of an interference in so doing, in *Outcalt* v. *Burnet*, 1 Handy (Cincinnati) 404, 407; but see In re *Terry*, 5 Biss. 110.

§ 134. — **Death.** — Whether the death of a special partner is a dissolution has been in some cases doubted, and in some States, as above shown, is made a dissolution by statute, unless the parties have otherwise agreed.

It frequently happens that parties desire to provide in the articles of partnership that the death of a member shall not dissolve the firm prior to its agreed continuance, or that a member by will requests the continuance of his interest in the firm for a certain time or for its full term.

By the law of general partnerships this can always be done, subject to the rule that only the property which the decedent then has in the firm is at stake, unless in the clearest and most unmistakable language he manifests an intention to embark his general estate in its risks; for otherwise the settlement of the general estate would be delayed until the end of the term and for years beyond, and the inheritance of his innocent heirs and distributees imperilled, and perhaps lost, without their fault. (Judge Story's exposition of this rule in *Burwell* v. *Mandeville*, 2 How. 560, is now practically universally conceded to be the law.) If the estate is either partially or wholly embarked in the continuance of the partner-

ship, the executor in carrying out the will in his representative capacity, and not dealing as a partner with third persons, or participating in the conduct of the business further than to advise and keep himself informed, incurs no personal liability as a partner either by holding out or by participation in the profits as executor.

This statement must be borne in mind by any one reading the following interesting case, decided by HOFFMAN, J., at Chambers, in which, however, statements inconsistent with the above must be discarded.

The articles of a general partnership contracted for in Brussels, but to be located in New York, provided that the death of J, one of the two partners, should not operate as a dissolution, but his representatives should have three months in which to designate an intention to continue the partnership. Upon the same basis, if they neglect to notify their intention, the partnership shall become a limited one as to them, the other partner being the sole manager. This provision was lawful in Brussels. J died. No notification was made by his representatives, but they claimed a dissolution and receiver. Held, the death dissolved the general partnership, the representatives did not choose to continue it as such, and cannot continue it as a limited partnership without pursuing the statute. It follows that it was dissolved by the death, and the survivor has the right to wind up the business, and is compellable to do so at the end of the three months. *Jacquin* v. *Buisson*, 11 How. Pr. 385.

"My impressions are . . . that the parties designated by articles or a will to continue a partnership, or to be interested in it after a death, should be obliged to renew the formalities of the statute if they would remain special partners with the fund alone responsible; and if they continue the business without

this form, then they become general partners, liable in like manner as all other dormant partners." *Ib.* 393.

In so far as any dictum in this case seems to require a formal renewal by executors, it is believed not to be the law. In the case of *Richter* v. *Poppenhausen*, 42 N. Y. 373; s. c. 9 Abb. Pr. (N. S.) 263, more fully cited under § 115 above, executors continued a limited partnership as provided by the will, apparently without renewal, and they were held not personally liable.

§ 135. Some States especially provide that parties may agree that death shall not be a dissolution; but probably this is universally true, and they may always so agree, though the only reported cases where it was done are *Walkenshaw* v. *Perzel*, 32 How. Pr. 233; 4 Robt. 426; *Richter* v. *Poppenhausen*, 42 N. Y. 373; s. c. 9 Abb. Pr. (N. S.) 263.

Where the statute allows such continuance, if so specified in the articles and assented to by the heirs, it was said in a special term case, by ROBERTSON, C. J., that some positive act of assent on the part of the representatives or heirs or next of kin, and not mere silent acquiescence, was required in order that third persons might know whether they elect to carry on the firm and dissolve and become mere creditors. *Walkenshaw* v. *Perzel*, 32 How. Pr. 233, 239; s. c. 4 Robt. 426, 432.

§ 136. The death of a special partner dissolves the partnership the same as if it were a general partnership. The statutory provision that no dissolution shall take place previous to the time specified without public notice, is not irreconcilable with this. The contract is a personal one, expiring at the death of any of the parties; for otherwise, if a general partner died, in whose name would the firm be carried on? If the administrator of either a general or special partner is to be a member, this introduces a new name into the firm. Although the special partner cannot interfere, yet it is a personal contract, for he has a right to advise, to scrutinize, and to contribute his

experience, wisdom, and abilities, and the surviving partner is not compelled to have a stranger thrust upon him. *Ames* v. *Downing*, 1 Bradford, 321; s. c. 8 N. Y. Leg. Obs. 317.

Death was also held to be a dissolution of a limited partnership, the same as of a general one, in *Jacquin* v. *Buisson*, 11 How. Pr. 385, 393. Cf. also *Mattison* v. *Demarest*, 4 Robt. 161, 177. In *Perth Amboy Manufacturing Company* v. *Condit*, 21 N. J. L. (1 Zab.) 659, 661, the court say they will not express an opinion as to whether the death of a special partner operates as a dissolution.

§ 137. —**By Decree in Equity.**— Some of the statutes, as shown above, provide that a dissolution for the usual causes may be applied for in equity. The causes for which a decree of dissolution would be granted in equity on application of a partner have already been enumerated (§ 130), and the opinion has been ventured that the courts are open to the application of a partner in a limited partnership the same as in a general one. It was suggested by LEONARD, J., in the Court of Appeals in New York, that a judicial inquiry on dissolution where the partnership name was the same as that of the general partner, was always advisable in order to ascertain as a finality which of his creditors are partnership creditors and which of the individual alone, in order not to hazard the priority of the partnership creditors in the distribution of the assets of the firm. *Kerr* v. *Blodgett*, 48 N. Y. 62, 69.

Where there was a defect in the formation of the partnership, — such that the limited partnership had never been made, — it was held a ground for a decree of dissolution on the application of a special partner, for the reason that as he is liable *in*

solido for all claims, and yet by his contract is excluded from participation in the management of the concern, he might otherwise be compelled to stand helplessly by, seeing his whole fortune and future wrecked, unable to stop the business,— which, the court said, was absurd and unjust. *Patterson* v. *Holland*, 7 Grant's Ch. (Up. Can.) 1.

Where one was induced by the fraudulent representations of others to become a special partner with them, and contributed his money, for which he was to receive interest and a share of the profits, and the firm went into operation, but the statutes were not complied with, and thus he became a general partner, as his name did not appear in the firm, and he took no part in the management of the business, his attitude was that of a dormant or secret partner. On discovering the fraud he at once rescinded the contract of partnership and withdrew from it; but such rescission could not rescind intervening contracts with third persons made by the firm while he was such partner to them, therefore he is liable. *Tournade* v. *Hagedorn*, 5 N. Y. Supreme Ct. 288; s. c. *sub nom. Tournade* v. *Methfessel*, 3 Hun, 144.

§ 138. It may be said of *Patterson* v. *Holland* that it was not a case of limited partnership at all, since the statute (p. 38, above) says that "no such partnership shall be deemed to have been formed until," etc.; and of *Tournade* v. *Hagedorn* that it was a case of rescission rather than of dissolution, and that neither case, therefore, is an authority sustaining the right of a court of equity to interfere. Nevertheless, the ordinary principles of contract and of partnership should justify such interference if the insanity, crime, or misconduct is on the part of the general partner. And perhaps under misconduct would be included the exclusion by the

general of the special partner from such rights as he has; viz., of inspection and of a share in the profits. Under Part IV. will be found statutes making the general partners liable to account to each other and to the special partners for their management, and rendering them liable for fraud in the affairs of the partnership.

As to parties defendant in the suit for dissolution, see § 193.

§ 139. **Publication of Dissolution.** — The rules as to publication are the same as in case of the formation of a limited partnership (see pp. 52–54); and where the publications were not at regular intervals of seven days, it was held that the special partner's claim as creditor against the firm's assignee in bankruptcy must be disallowed, — doubtless because he became a general partner as to subsequent transactions. In re *King*, 5 Ben. 453; s. c. 7 Bankr. Reg. 279.

Filing proof of publication of the notice of dissolution is not required by any of the statutes; therefore where all the steps for dissolution, including the publication, were duly made, the fact that proof of the publication was not filed until some time afterwards does not postpone the dissolution. *Mattison* v. *Demarest*, 4 Robt. (N. Y.) 161, 172.

§ 140. **No Dissolution till Publication has expired.** — The dissolution by act of the parties is not complete until the time for publication has expired. Up to that time the special partner's capital is liable for all engagements the firm may make, or he is liable for them *in solido* if he withdraws his capital before then, unless he shows that the creditor had actual notice of the disso-

lution before dealing. *Beers* v. *Reynolds*, 11 N. Y. 97, affirming s. c. 12 Barb. 288; *Buckley* v. *Bramhall*, 24 How. Pr. 455; s. c. sub nom. *Bulkley* v. *Marks*, 15 Abb. Pr. 454; *Fanshawe* v. *Lane*, 16 Abb. Pr. 71.

§ 141. **Other Notice of Dissolution, when necessary.** — This section of the statute in my judgment relates solely to the sufficiency of notice as between the special partners and creditors; *i. e.*, First, the partnership may be dissolved at any time without notice, and the dissolution is good as between the partners. Second, where there are two or more general partners, if the mere publication of the statutory notice will convey notice to former dealers, in the absence of actual knowledge of the dissolution, that each general partner thenceforward ceases to be the agent of all, then the rights of dealers with a limited partnership are far less than those of dealers with a general partnership, for the latter are entitled to actual notice or actual knowledge of the dissolution to cut off their right to rely on the continuance of the agency; and as there is no reason to believe that the rights of dealers with a limited partnership are less than with a general partnership, and as the whole policy of other provisions of the statute is to the contrary, it seems to me clear that a general partner who desires to protect himself against the acts of other general partners cannot rest on the statutory notice of dissolution, but must see that former dealers have actual knowledge. As against the special partners he of course needs no such protection, for they never were agents of the firm. Third, if I am right in the above statement, it follows that the statutory notice merely protects the fund of

the special partners from further dealings by the general partners. Fourth, the same line of reasoning shows that when the statute says that an alteration is a dissolution, this is not a dissolution by operation of law; but the notices would be required even if the statute did not also add that the partnership if carried on is thereafter a general one.

The only decision touching any part of the above section was one where a person was indicted for embezzlement of goods laid in the indictment as belonging to A and B, and the defence showed that the goods had belonged to a limited partnership composed of A, B, and C, of which no publication of dissolution had been made, and it was claimed that it therefore still continued, and hence that there was a variance between allegation and proof; but it was held that oral evidence was admissible to show a dissolution in fact, and that the statutory provision that there should be no dissolution until publication applied only to creditors and dealers without notice, but not *inter sese*. *Ker* v. *People*, 110 Ill. 627, 644–5.

§ 142. If the formation of the partnership was defective, so that a limited partnership never took effect, it has been held that the public or dealers are not affected with knowledge by operation of law of the expiration of the partnership, but that, as in other general partnerships, the liability of all for the acts of each continues until proper notice to dealers and to the public, *Haviland* v. *Chace*, 39 Barb. 283 (see p. 93). In such case, as also in the case of a dissolution by alteration, the special partners may occupy the position of dormant partners, and if they do, their retirement may be without notice; but as in fact they may be known to be partners to

many, and as to such persons they are not dormant partners, the usual rule as to notice is applicable (see p. 94).

§ 143. **Notice of Dissolution, when not necessary.** — In the event of dissolution by operation of law no notice of dissolution is necessary, for none is required of members of general partnerships, except in the case of conveyance of his interest by one partner; because such causes as death, bankruptcy, war, and marriage, are presumed to be notorious to all, and so of a decree of dissolution, and the statutes make no notice necessary. Examples of this have been given under § 131 *et seq.*

The case of the expiration of a general partnership differs from that of a limited partnership. Such termination of a general partnership must be properly notified; for dealers and the public do not know of the articles of partnership, and are acquainted with the fact of partnership from the acts of the parties, and the limit of duration stands on the same basis as any other secret term of the contract. In limited partnerships, however, the knowledge of dealers and of the public, if they have any knowledge, is in legal contemplation, and probably in fact, — since the special partners' names are suppressed, and they cannot interfere in the business, — derived from the record or publication of its formation, which at the same time conveys notice of its duration. And if dealers and the public have no knowledge of the partnership, the special partners stand to them exactly in the relation of dormant or secret partners, who are never required to give notice of dissolution. From these considerations, supported by the absence of statutory

requirement, notice of dissolution by expiration of the term of a limited partnership is clearly unnecessary; and it was so held in *Haggerty* v. *Taylor*, 10 Paige, 261; *Marshall* v. *Lambeth*, 7 Rob. (La.) 471.

§ 144. **Continued Use of Name after due Dissolution.** — Where the partnership was to expire by limitation on Aug. 1, 1840, and in June, 1840, it was dissolved by mutual consent, and due publication made, the special partner selling his interest to the general partners, who agreed to take charge of the liquidation of all debts, and the general partners continued the business in the same name, and in the following year made the acceptance on which the special partner was sued, the court said that the special partner could not prevent the general partners from using the same name as long as they pleased, and that no liability could be based on his knowledge that they had done so. As his name could not appear in the firm, the rule fastening a liability on a retiring partner who suffers his name to remain, cannot apply. That he had an office in the same building and his own sign up, is of no importance whatever. *Marshall* v. *Lambeth*, 7 Rob. (La.) 471.

CHAPTER II.

INSOLVENCY.—FRAUDULENT CONVEYANCES.

§ 145. **Statutes.**—"Every sale, assignment, or transfer of any of the property or effects of such partnership made by such partnership when insolvent or in contemplation of insolvency, or after, or in contemplation of, the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership, and every judgment confessed, lien created, or security given by such partnership under the like circumstances and with the like intent, shall be void as against the creditors of such partnership."

ALA. § 2083. ARK. § 4368.
DIST. COL. § 510, adds "or of any general partner."
FLA. § 16, about same as DIST. COL. GA. § 1939.
IOWA, § 2166. MD. § 15. MINN. § 17.
NEB. § 20. N. J. § 20. N. Y. § 20.
OHIO, § 3156. PA. § 22. S. C. § 1320.
TEX. § 3460. WIS. § 1719.
ILL. § 22, makes void any transfer, judgment, or lien by the partnership or any member in contemplation of insolvency for the purpose of preferring any of their creditors, but does not have any provisions corresponding to the following.

§ 146. "Every such sale, assignment, or transfer of any of the property or effects of a general or special partner, made by such general or special partner when insolvent or in contemplation of insolvency, or after, or in contemplation of, the insolvency of the partnership, with the intent of giving to any creditor of his own or of the partnership a preference over other creditors of

the partnership, and every judgment confessed, lien created, or security given by any such partner, under the like circumstances and with the like intent, shall be void as against the creditors of the partnership."

Ala. § 2084.	Ark. § 4369.	Ga. § 1940.
Iowa, § 2167.	Md. § 16.	Minn. § 18.
Neb. § 21.	N. J. § 21.	N. Y. § 21.
Pa. § 23.	S. C. § 1321.	Tex. § 3461.
Wis. § 1720.		

§ 147. "Every special partner who shall violate any provision of the two last preceding sections, or who shall concur in or assent to any such violation by the partnership, or by any individual partner, shall be liable as a general partner."

Ala. § 2085.	Ark. § 4370.	Dist. Col. § 511.
Fla. § 17.	Ga. § 1941.	Iowa, § 2168.
Md. § 17.	Minn. § 19.	Neb. § 22.
N. J. § 22.	N. Y. § 22.	Ohio, § 3157.
Pa. § 24.	S. C. § 1322.	Tenn. § 1754.
Tex. § 3462.	Wis. § 1721.	

District of Columbia (and see Tennessee also) has preserved the phrase "last *two* preceding sections," although there is but one preceding section to which it can apply. Florida and Ohio have corrected this. Nebraska and Wisconsin, and perhaps others, have "assist" for "assent."

Ky. § 10, Mo. § 3410, and Tenn. § 1753, are as follows:

"No sale, transfer, or charge upon ["change of," Missouri] the property or effects of the firm, or any member thereof, made for the purpose of giving a preference or priority to one over others of his or its creditors, shall be valid against its creditors if made when he or the firm is insolvent or in contemplation of insolvency."

Cal. § 7496, Dak. Ty. § 1466, and Wy. Ty. § 17, are as follows: —

"Every transfer of the property of a special partnership or of a partner therein made after, or in contemplation of, the

insolvency of such partnership or partner, with intent to give a preference to any creditor of such partnership or partner over any other creditor of such partnership, is void against the creditors thereof; and every judgment confessed, lien created, or security given in like manner and with the like intent, is in like manner void."

The following have no provisions: —

COLORADO.	CONNECTICUT.	KANSAS.
LOUISIANA.	MAINE.	MASSACHUSETTS.
NEW HAMPSHIRE.	NORTH CAROLINA.	OREGON.
UPPER CANADA.	UTAH TERRITORY.	VERMONT.
VIRGINIA.	WASHINGTON TERRITORY.	WEST VIRGINIA.

But take notice that some of these have the sweeping provision noted in § 97 above, and the remaining States only as follows: —

§ 148. "No general assignment by said partnership in case of insolvency or where their goods and estate are insufficient for the payment of all their debts shall be valid unless it shall provide for a distribution of the partnership property among all the creditors in proportion to the amount of their several claims" ["excepting claims of the General Government arising from bonds for duties, which are to be preferred," DELAWARE, MICHIGAN, and RHODE ISLAND].

DEL. § 6.	IND. § 6041.	MICH. § 2356.
MISS. § 1025.	MON. TY. § 950.	NEV. § 476.
R. I. 10.		

§ 149. "In case of an assignment, as provided for in the preceding section, the assent of the creditors shall be presumed ["presented," MONTANA], unless within sixty days after notice thereof they shall dissent ["either expressly or by some act clearly implying such dissent," INDIANA, MICHIGAN]; and no such assignment shall be valid unless notice thereof shall be given in some newspaper printed in the county where the place of

business of the party making it is situated (or, if no newspaper be printed in such county, then in some newspaper printed in the State nearest thereto) within fourteen days after the making of such assignment."

IND. § 6042.	MICH. § 2357.	MISS. § 1026.
MON. TY. § 951.	NEV. § 477.	

§ 150. **What is Insolvency.** — Insolvency and inability to pay are synonymous. But solvency does not mean ability to pay at all times, under all circumstances, and everywhere on demand, nor not having money enough in possession to pay all claims. If the property is in such a situation that all debts may be collected out of it by legal process, it is solvent. If the assets are worth $100,000 and the debts are $70,000, insolvency is not made out sufficiently to warrant interference. *Walkenshaw* v. *Perzel*, 32 How. Pr. 233, 240; 4 Robt. 426, 433.

One of the objects of the provision is to secure a *pro rata* distribution among creditors. Therefore to hold that open and notorious bankruptcy is the only test of insolvency would defeat the act. Yet so to call a failure to meet an engagement in the usual course of business would seem harsh, and tend to discourage such partnerships; for if a partnership could not discharge its more pressing obligations by sales or assignments, a winding up would be rendered necessary. "Insolvency" therefore here means that the partnership has not sufficient property to pay its debts. *McArthur* v. *Chase*, 13 Gratt. (Va.) 683, 693–4.

The special partner's act of influencing a general partner to leave the State, which is an act of bankruptcy by the latter, is not by the former any more than it would be by a stranger who used his influence to procure a withdrawal from the firm. In re *Terry*, 5 Biss. 110.

Under the chapter on the section forbidding the special partner claiming as creditor in case of insolvency, I have suggested that the word "insolvency" may have a different meaning from here; that here it meant the state of insolvency in the abstract, whether declared or not, or known or not; and there it was used rather in a concrete sense, as a declared fact and a cause for dissolution. It is true the authorities have not noticed this, and seem not altogether consistent with it; but that does not alter my opinion on the subject, the reasons for which are outlined there.

Insolvency here is something like the insolvency which is a condition to the right of stoppage *in transitu*, and that subject will furnish a field, if needed, for authorities.[1]

§ 151. **Fraudulent Conveyance, void as to whom.** — An assignment for the benefit of creditors by a limited partnership in which any preference is given to one creditor over another, will be held void on the application of a creditor, though as between assignor and assignee it might be valid, and though it would have been valid had the partnership been a general one. *Mills* v. *Argall*, 6 Paige, 577; *Bowen* v. *Argall*, 24 Wend. 496; *Durant* v. *Abendroth*, 97 N. Y. 132, 144.

Only creditors could take advantage of the invalidity of such assignment. And suing the special partner as a general one, and resorting to a fund in a bankrupt court

[1] See Houston on Stoppage in Transitu, or Benjamin on Sales, § 837, in Mr. Bennett's admirable notes to which will be found all the American cases except one or two early ones of no great importance.

arising from an assignment in bankruptcy by the general partners alone, who represented themselves as the sole debtors, does not waive this right to vacate the assignment in insolvency for such preferences. *Durant* v. *Abendroth*, 97 N. Y. 132, 144–5.

So a judgment confessed by the general partner in favor of the special partner to secure his share of the capital, cannot be questioned by the individual creditors of the general partner as being void, for the statute has nothing to do with them. *Purdy* v. *Lacock*, 6 Pa. St. 490.

§ 152. **What is a Fraudulent Conveyance or Preference.** — The forbidding all transfers by an insolvent firm and declaring void "judgments confessed or liens created," only avoids preferences expressly and voluntarily made by the partners, or any one of them, fraudulently or in collusion with the creditors. It does not apply to judgments recovered *in invitum* or suffered by default or otherwise (see § 163). *Van Alstyne* v. *Cook*, 25 N. Y. 489.

But if the limited partnership is solvent, and the general partners sell all the firm's effects and business to the special partner, who assumed all the debts except the one in suit, and the general partners thereupon became insolvent and probably made the sale in contemplation of their own insolvency and to avoid and defeat the payment of the debt in suit, but not with the design of preferring any creditors, and the special partner thereupon carries on the business in his own name; although he becomes liable as general partner for interference, yet this is not a violation of the above sections (§§ 145, 146), for such assignment was not made in contemplation of the insolvency of

the firm, which was abundantly solvent, or with intent to give any creditor of the firm or of either of the partners a preference over other partnership creditors. *First National Bank of Canandaigua* v. *Whitney*, 4 Lansing, 34, 38.

Where the general partners assumed and gave judgment notes for a debt due by the special partner to one C for his share of the capital, which he had procured by borrowing from C, and C took judgment and levied on the firm's property, whereupon a general creditor of the firm asked an injunction against execution sale, it was held that as the firm was solvent when the debt was so assumed, this was not against the prohibition of transfers when insolvent, and though void as against the firm as a withdrawal (see WITHDRAWAL), was valid against the general partners. *Coffin's Appeal*, 106 Pa. St. 280; reverses s. c. sub nom. *Coffin* v. *Gruber*, 14 Weekly Notes, 140.

In *Pusey* v. *Dusenbury*, 75 Pa. St. 437, it was said that the statute against transfers when insolvent related to the affairs of an existing and not of a dissolved partnership. The facts limit this statement, however; for where the special partner, fearing fraudulent misappropriation of assets by the liquidating partners, brought suit for an account, receiver, etc., his compromise of the suit by being paid for his claim was held not to make him liable, as he was merely trying to prosecute his just rights.

And see cases cited under the next section.

§ 153. **Consequences of Violation.** — Most of the statutes (§ 147) make a special partner who concurs in a violation of these provisions liable as a general partner. If he was innocent of participation, he is not thus liable. And as this liability must chiefly relate to existing creditors, it is in the nature of a punishment or penalty.

Where the special partner of an insolvent firm took from it a deed of trust in favor of another firm of which he was

member, it was said in Virginia, although that State has no provision on the subject, that he makes himself thereby a general partner. *McArthur* v. *Chase*, 13 Grattan, 683, 697.

A conveyance by the general partners of a house and lot belonging to the limited partnership to a firm of which the special partner is a member five days before insolvency for a consideration partly consisting of prior loans, if the general and special partner knew the condition of the firm, or could by reasonable diligence have discovered it, was made with intent to prefer a creditor; and as it was made to the special partner himself and others, it must be presumed to be with his concurrence, and he therefore becomes liable as a general partner. The question of intent here is not for the jury. The parties were bound to make diligent inquiry as to the solvency of the firm. (Supr. Ct. Md. 1886) *Lineweaver* v. *Slagle*, 2 Atlantic Rep. 693.

Where the general partners made an assignment of the firm property for the benefit of creditors giving preferences to certain creditors, and among them to the special partner for loans and providing for repayment of his capital, the court said, had the special partner concurred in or assented to this it would have been fatal to his claim to the protection of the statute, and would have subjected him as a general partner; but as the jury found he had not assented to it, that effect would not follow. *Bowen* v. *Argall*, 24 Wend. 496.

A special partner who caused or was a party to a transfer of all the assets of an insolvent limited partnership to one creditor, and made a contract with him as to their disposal and in regard to the payment of debts, was held to have become liable as a general partner; but the decision was based on a now-repealed provision against the special partner making contracts with any one except the general partner. *Farnsworth* v. *Boardman*, 131 Mass. 115.

Where the general partners paid to the special partner a

note executed before the partnership was formed, and secured by a mortgage, — whether before insolvency or not does not appear, — MILLER, J., said that it is extremely doubtful whether the transaction was in any way affected by the statutes. (Supr. Ct. Md. 1886), *Lineweaver* v. *Slagle*, 2 Atlantic Rep. 693, 700.

§ 154. The provisions against preferences have also been held to refer only to an existing partnership, and to have no application after the firm is dissolved. The cases hardly sustain this, as they are properly cases of withdrawal or of sales between the partners.

This was stated to be the law in *Pusey* v. *Dusenbury*, 75 Pa. St. 437; given more fully under § 152.

A sale after dissolution by the special to the general partners does not enlarge the former's liability, even though the agreement was made before dissolution. *Lachaise* v. *Marks*, 4 E. D. Smith, 610.

In *Mattison* v. *Demarest*, 4 Robt. (N. Y.) 161, after due dissolution the general partners bought out the interest of the special partner and formed a new general partnership, giving him the acceptances of the new firm on payment. The failure of the new firm was known to be inevitable, and in fact in sixteen months afterwards it assigned for the benefit of creditors, preferring the debt due the special partner, and the sale and credit given were in order to postpone the failure until the debts of the old firm were paid. This if fraudulent as to the creditors of the new firm, was held not the kind of fraud which will vitiate the assignment. The acceptances were held a valid debt which could be legally preferred. Only the creditors of the old firm can object.

§ 155. **Transfer by Special Partner of his Separate Property.** — The provisions of § 146 above, in so far as they

seem to forbid a special partner when insolvent, or when solvent and the firm is insolvent, to transfer any of his individual property to his individual creditor, are not only harsh, but entirely unreasonable. If he has complied with the statute as to the formation and conduct of the limited partnership, his capital therein is alone liable for the firm's debts. What reason, therefore, is there in preventing his use of his separate property to pay his individual debts, especially as the rule[1] is almost universal that in distribution in equity of partnership funds the separate creditors have a priority over firm creditors in the distribution of the individual property? And why should the special partner or his creditor pay and receive payment at the risk of the unknown solvency of the firm?

This provision has been a puzzle to the courts, and while not determining its meaning, they have, whenever the question has arisen, been unanimous that its rigor should be mitigated by a very strict construction; and I can conjecture no other explanation in addition to that given in the next case except that the legislature of New York, which first enacted the section, regarded, as did some of the earlier cases (see p. 83), the special partner as a mere creditor and not a partner at all; and hence in forbidding a partner to transfer his property, referred to a general partner only.

In MARYLAND a statute was passed (Laws of 1884, p. 204) stating that the separate estate and separate debts

[1] I am aware that this rule depends more on dicta than on decisions; but the dicta are numerous enough to overwhelm the doubters.

of the special partner were not subject to insolvency proceedings against the firm.

The question was first considered by Mr. A. W. Bradford, as referee, in 1862, in *Fanshawe* v. *Lane*, 16 Abb. Pr. 71. In that case some of the general partners were the partners in an independent general partnership which made an assignment for the benefit of its creditors, with certain preferences allowed under New York laws by the general laws as to insolvency; and the referee held that this was not an assignment of their individual property, and therefore did not assign their individual interests in the limited partnership, and was therefore valid as against the creditors of the limited partnership. The referee suggested that the above prohibition of the statute does not apply to assignments of property in no way connected with the partnership, but merely to assignments of the firm property or of the partner's individual interests therein.

The next case is *George* v. *Grant*, the report of which on demurrer is in 20 Hun, 372. This was in effect overruled in general term in 28 Hun, 69, in 1882, and this latter decision was affirmed in 1884 in the Court of Appeals in 97 N. Y. 262. The facts in brief were: that the special partner of a limited partnership, which he knew was insolvent, made a mortgage on his individual real estate to secure a loan, the proceeds of which he used to pay off certain of his individual debts which he intended to prefer, and among them a debt due by him to a firm of which the mortgagee was a member. The action was to set aside the mortgage as invalid, as in violation of the above section of the statute. On the demurrer, Brady, J. (20 Hun, 372, 376), said: "This statute, as suggested in *Fanshawe* v. *Lane*, 16 Abb. Pr. 71, is susceptible of two interpretations. The design would seem to be to keep the partnership interest intact for creditors of the firm and to subject the individual rights acquired by the limited relation to their

demands, and not to extend the equity to the individual property of the special partner." While POTTER, J. (p. 375), says: "The provision makes such preferences void, regardless of any knowledge by the creditor of the insolvency or the intent of the partner."

In the second stage of *George* v. *Grant*, in 28 Hun, 69, the court held the mortgage valid, although the mortgagee knew of the insolvency of the limited partnership and of the intention to prefer creditors in the application of the proceeds. DAVIS, P. J. (pp. 71–2), says: "If the statute creates a rule which prevents with absolute rigor the special partner of a limited partnership which becomes, or is known to be about to become, insolvent from applying his individual property to pay private debts which he actually owes in good faith, intending that they shall be paid preferably to debts owing by the limited partnership, and for which his contribution to the firm capital is alone liable, then it has imposed a hardship upon him and his creditors which requires from the courts a strict construction to mollify its unjust severity. It must be restricted to cases clearly within its reasonable scope; otherwise special partners who have paid in their share of the capital and have done no acts to extend their personal liability beyond that amount, may suddenly find themselves unable to pay a private debt without being charged with giving a fraudulent preference. The legislature had no intention to prevent special partners from applying their private property to pay their private debts whenever equity and good faith permits or demands it."

In the Court of Appeals, 97 N. Y. 262 (the court affirming, 28 Hun, 69, but, unlike the ruling there, regarding the lender as ignorant of the insolvency of the firm), ANDREWS, J. (pp. 268–70), remarks that the language of the statute is very broad, and that it is "difficult to understand how the appropriation of the individual property of the special partner to the payment of his individual debts can affect the rights of the firm creditors,

since neither the special partner nor his individual property is liable for the partnership debts." But he does not decide the point, holding that whether such be the law or not, yet a mortgage by the special partner of his individual property given to borrow money is not a preferring creditors, the lender not knowing of the insolvency, and being informed at the time that the money was wanted to pay debts; and therefore if there was any preference, it was not in the mortgage, but in the application of the proceeds. To make the lender suffer in such case "would be very dangerous in practice and create great uncertainty in the transactious of banks and individuals, since it would impose upon a lender the necessity of inquiring and ascertaining at his peril whether the borrower was a member of a limited partnership, and if so as to his solvency and the solvency of the limited partnership. And though the mortgage included an existing debt due from the special partner to the mortgagee, this does not invalidate the rest of the security."

CHAPTER III.

RIGHTS IN CASE OF INSOLVENCY.

§ 156. **Insolvency makes a Trust for Equality of Distribution.** — We now come to a matter in which limited partnerships differ widely from general partnerships; namely, the doctrine that insolvency of the firm turns the assets into a trust fund for creditors equally, and thus enables them to enforce this equality without the assistance or through the lien of the partners. It may be remarked that the cases establishing this, with the exception of one in Missouri and one in Virginia, are wholly New York cases.

The leading case on the consequences of insolvency of a limited partnership is *Innes* v. *Lansing*, 7 Paige, 583 (1839), in which it was ruled that as the legislature particularly aimed at equality among the creditors of an insolvent limited partnership, yet did not specify how to enforce such equality, a court of equity would regard the assets of such partnership as a special or trust fund from the time of insolvency; and that any creditor, though he be a general one, — that is, a creditor who has not obtained judgment on his claim, — could apply to the court on behalf of himself and all other creditors to enforce the trust on an allegation of insolvency, and wind-up and distribute the assets equally, or that he could pursue his claim at law, and by judgment and execution

acquire a preference, unless some other creditor had in the meantime obtained a decree for equal distribution.

These propositions require a separate examination, and have been slightly modified by later decisions.

§ 157. **Reason of the Doctrine.** — In *Innes* v. *Lansing*, 7 Paige, 583, it was held that on insolvency the partnership property became a trust fund. This is said to be because the *right* to a ratable share is given by the statute without any means being stated for its enforcement. If a creditor at large could not go into chancery, this special provision of the statute would in most cases prove nugatory; or, to quote the language of Chancellor WALWORTH in that case, which language is approved in *Batchelder* v. *Altheimer*, 10 Mo. App. 181, 186: "The legislature could not have intended that a creditor of such insolvent limited partnership should be compelled to proceed to judgment and execution at law, the necessary effect of which may be to give him a preference over other creditors before he could file a bill to prevent the partnership assets from being wasted by the insolvent partners;" and in *McArthur* v. *Chase*, 13 Gratt. 683, 693, it was recognized that one of the main objects of the statute was to secure *pro rata* distribution of assets; and so of other cases cited in § 160.

§ 158. **Nature and Beginning of the Trust.** — In regard to the nature and beginning of the trust, and at what point a creditor's right to pursue his claim to execution and obtain a preference in the assets of the firm exists, the drift of later decisions has wandered a little from the earlier course; the earlier cases holding that from the

moment of insolvency this special trust arose, and from that time levies of execution would be set aside.

In *Innes* v. *Lansing*, 7 Paige, 583, 586 (1839), general language had been used that the property after insolvency would be a trust, and that the delay of the partners to place it in the hands of an assignee for ratable distribution would justify a receiver. The effect of this language was for a time considered to be that insolvency in fact creates the trust and renders priorities among creditors impossible, if attacked, whether obtained by execution or voluntary act of the debtors.

In *Whitewright* v. *Stimpson*, 2 Barb. 379, it was decided, in 1848, that such was the law; and the same doctrine was in 1849 approvingly cited in *Hayes* v. *Heyer*, 3 Sandf. 293.

In *Jackson* v. *Sheldon*, 9 Abb. Pr. 127, it was decided that the trust attaches the moment the firm becomes insolvent, and that no creditor can thereafter obtain a preference by reason of the neglect of the partners to make an assignment for creditors; and a receiver will take the property free from the liens of executions, and if a sale has been made, the sheriff will be directed to hold the proceeds.

§ 159. But the later cases explain the nature of the so-called trust more fully and a little differently. Under the statutes forbidding conveyances to prefer creditors in case of existing or contemplated insolvency, it is clear that the assets become in a measure trust funds so far as any action of the partners is concerned, from the time of insolvency, in so far as to enable the court to set aside such voluntary preference; but so far as any action of creditors to obtain a priority by hostile proceedings is concerned there is no trust, according to the later cases, which will prevent this except from the time

the court takes possession of the property or fund, either by decree or a receiver, up to which time liens obtained by hostile proceedings acquire a preference, and equality will be enforced by the chancellor among the creditors at large.

In *Artisans' Bank* v. *Treadwell*, 34 Barb. 553, in 1861, there had been,— First, an action by and judgment in favor of a creditor; Second, a suit by a general creditor to wind up the concern and for a receiver; Third, execution on the first-named judgment; Fourth, a receiver appointed in the second suit, the appointment to take effect from the beginning of suit: the latter order was held invalid in so far as it related back to supersede the judgment, and *Jackson* v. *Sheldon* is explained as being founded on collusion between the partners and the prosecuting creditor.

In *Van Alstyne* v. *Cook*, 25 N. Y. 489, 494–6, sustaining the priority of an execution levied a few hours before a receiver was appointed and took possession, the court says the assets are only trust funds in the sense that the property of any partnership having once passed into the control of chancery is a trust fund for the payment of the debts *pro rata*, i. e., when a court of equity is properly appealed to in behalf of the partners or any partner or creditor to protect and distribute upon equitable principles *and* on such application asserts control over them. They are not trust funds in the hands of the partners any more than ordinary partnership property. There is no statute or any rule in equity which makes them trust funds in any other sense. A suit for an accounting and winding up is a *lis pendens* between the partners giving the court an exclusive control over the property for liquidation, being in effect a suit on behalf of the general creditors; but as against other persons or any private creditor pursuing his legal remedies, such suit is not a lien until an order for the appointment of a receiver.

Such order, however, amouuts to a sequestration, and the receiver's title when he is appointed vests by relation from the date of the order; but an execution levied before such order is a prior lien.

In *Batchelder* v. *Altheimer*, 10 Mo. App. 181, the history of the doctrine is examined, and the court follows the New York cases in regarding the fund as a trust fund, but does not decide whether the trust begins from the moment of insolvency or from action begun and *lis pendens*, or from decree; holding, however, that the appointment of a receiver is a sequestration of the property, which vests in him from the time of the order (p. 190).

§ 160. **General Creditor's Right to enforce Equality.** — The right of a general creditor — meaning thereby a creditor at large or who has not yet obtained judgment and execution — to apply for enforcement of the trust is well settled in New York; but the bill must be in behalf of himself and all other creditors and allege insolvency, and may restrain the partners from disposing of the assets contrary to law and ask a receiver. *Innes* v. *Lansing*, 7 Paige, 583; *Whitewright* v. *Stimpson*, 2 Barb. 379; *Levy* v. *Ley*, 6 Abb. Pr. 89; *La Chaise* v. *Lord*, 1 Abb. Pr. 213; s. c. as *La Cliaise* v. *Lord*, 10 How. Pr. 461; s. c. as *Lachaise* v. *Marks*, in notes to 4 E. D. Smith, 610, 612; *Jackson* v. *Sheldon*, 9 Abb. Pr. 127; *Greene* v. *Breck*, 32 Barb. 73; *Artisans' Bank* v. *Treadwell*, 34 Barb. 553; *Van Alstyne* v. *Cook*, 25 N. Y. 489; *Walkenshaw* v. *Perzel*, 32 How. Pr. 233, 237; s. c. 4 Robt. 426, 431; *Whitcomb* v. *Fowle*, 7 Abb. New Cas. 295; s. c. 56 How. Pr. 365; s. c. 10 Daly, 23; and cf. *Kerr* v. *Blodgett*, 48 N. Y. 62; *Batchelder* v. *Altheimer*, 10 Mo. App. 181.

A judgment creditor of course has the same rights, *McArthur* v. *Chase*, 13 Gratt. (Va.) 683.

That the fund becomes a trust fund on insolvency, for the proper administration of which a general creditor may apply to equity, is also recognized in dicta in the following cases, which are not cases on limited partnerships; viz., *Conro* v. *Port Henry Iron Co.*, 12 Barb. 27, 60; *Groshon* v. *Lyon*, 16 Barb. 461, 466; *Galwey* v. *United States Steam Sugar Refining Co.*, 36 Barb. 256, 264.

In such suit the special partners as well as the general must be made defendants, though an injunction and receiver already granted will not be set aside on motion for want of such party, the property not being in his custody or control. *Schulten* v. *Lord*, 4 E. D. Smith, 206, 209.

In *La Chaise* v. *Lord*, 1 Abb. Pr. 213; s. c. as *La Chaise* v. *Lord*, 10 How. Pr. 461; s. c. as *Lachaise* v. *Marks*, 4 E. D. Smith, 610, 612, notes (1855), it was held that a receiver would not be granted on the application of a general creditor and the funds tied up, if the partners denied liability.

§ 161. This right of the creditor, as it asks the administration of a special fund under the statute, arises on insolvency, and does not need the additional facts of abuse of assets by the partners. Thus where the partners are paying the creditors ratably and are trying to make the most of the assets, and have offered the plaintiff his *pro rata* share, and the management of the partners would be advantageous to the creditors, yet this cannot prevent the plaintiff insisting on his legal right to have the court administer, as was held in two special-term cases,— *Whitewright* v. *Stimpson*, 2 Barb. 379 (1848); *Levy* v. *Ley*, 6 Abb. Pr. 89 (1858).

In the former case it was admitted that a creditor had

begun action and would obtain a preference unless the court took charge, which makes the case parallel to the unreported case of *Beebe* v. *Boswell* (§ 162), refusing the relief; except that in the latter it does not appear that insolvency was alleged. But in such case the clearest evidence of insolvency would be required, *Walkenshaw* v. *Perzel*, 32 How. Pr. 233, 240; s. c. 4 Robt. 426, 433.

§ 162. **A Partner has the Same Right.** — Any partner, it seems, has the same right that a creditor has in case of insolvency to apply to a court of equity to take charge of and wind up the concern and distribute the assets as being a special trust fund. This rule was recognized in *Bell* v. *Merrifield*, 28 Hun, 219, 226; *Van Alstyne* v. *Cook*, 25 N. Y. 489; *Hogg* v. *Ellis*, 8 How. Pr. 473; *Snyder* v. *Leland*, 127 Mass. 291, an application by the special partner; *Walkenshaw* v. *Perzel*, 32 How. Pr. 233; s. c. 4 Robt. 426, an application by the executor of the special partner.

But where there has been a dissolution by death of the special partner, and the surviving partner is engaged in winding up, he is acting as trustee and will not be disturbed at the suit of the executor by the appointment of a new trustee or receiver, unless there is the clearest evidence of insolvency. *Walkenshaw* v. *Perzel*, 32 How. Pr. 233, 240; s. c. 4 Robt. 426, 433.

And it seems that danger of insolvency from the conduct of the general partner in winding up might be sufficient ground for a receiver, though mere danger of loss would not be. *Snyder* v. *Leland*, 127 Mass. 291.

But a mere danger of preference by reason of a creditor being about to obtain judgment and execution is not sufficient

to justify a receiver, as was held in a case not reported, where it did not appear but that it was a going concern and not in process of winding up, nor that there were allegations of insolvency, nor whether the application was by a partner or a creditor. *Beebe* v. *Boswell*, Com. Pl. Phila., Jan. 22, 1853, cited in 2 Brightly's Purdon's St. ed. of 1872, p. 938, note (*a*).

§ 163. **Creditor's Right to get Preference.** — A general creditor, instead of seeking the intervention of equity on behalf of himself and other creditors, may proceed in hostility to them, and if he can by superior diligence, may get judgment and execution at law, and thus obtain a preference; for the court seems to administer the assets with reference to the priority of liens as they exist when it obtains control. *Innes* v. *Lansing*, 7 Paige, 583, 586; *Greene* v. *Breck*, 32 Barb. 73 [reversing s. c. 10 Abb. Pr. 42]; *Artisans' Bank* v. *Treadwell*, 34 Barb. 553; *Van Alstyne* v. *Cook*, 25 N. Y. 489; *La Chaise* v. *Lord*, 1 Abb. Pr. 213; s. c. as *La Cliaise* v. *Lord*, 10 How. Pr. 461, and as *Lachaise* v. *Marks*, 4 E. D. Smith, 610, 612, notes; *Batchelder* v. *Altheimer*, 10 Mo. App. 181.

The only contrary cases are *Greene* v. *Breck*, 10 Abb. Pr. 42, which was reversed in 32 Barb. 73, above cited, and *Jackson* v. *Sheldon*, 9 Abb. Pr. 127, where sale under execution was enjoined on the application of a general creditor; but the decision was based, as stated in *Artisans' Bank* v. *Treadwell*, 34 Barb. 553, largely on collusion between the judgment creditor and the partners, which the statute forbids, for it makes void "judgments confessed or liens created" by the partners. See *Van Alstyne* v. *Cook*, 25 N. Y. 489.

§ 164. **Practice Cases.** — Two conflicting decisions on a point of practice may be here noticed for preservation. It was

said that in the suit of a general or simple contract creditor on behalf of all the creditors for a receiver and injunction, it was not proper to seek to charge the special partner as a general one, but such issue should be in a separate proceeding, in *La Chaise* v. *Lord*, 1 Abb. Pr. 213 ; s. c. as *La Cliaise* v. *Lord*, 10 How. Pr. 461, and as *Lachaise* v. *Marks*, 4 E. D. Smith, 610, 612, notes.

But a different ruling was made in a similar case where judgment creditors filed a bill for themselves and others to set aside a deed and distribute partnership assets, and it was said that the court could go on and render personal decrees, and if the special partner is liable as a general one, can enforce that liability, *McArthur* v. *Chase*, 13 Gratt. 683, 698. And it was said that a special partner who had not complied with the statutes is liable to be included as a general partner in proceedings in insolvency in *Lancaster* v. *Choate*, 5 Allen, 530.

Innes v. *Lansing*, 7 Paige, 583, also rules that such a bill by one creditor on behalf of himself and the other creditors may be discontinued by such creditor at any time before decree, and the defendants may have it dismissed up to that time by paying the complainant what is due him with costs. Also that the pendency of such bill does not prevent another creditor filing a similar bill, but as soon as a decree in one case is obtained, the other may be stayed if no additional relief can be had than under the decree already made ; and this chancery rule was held to be the same under the code in *Mattison* v. *Demarest*, 1 Robt. 717 ; s. c. 19 Abb. Pr. 356, holding also that the court cannot grant an order that the suit is for the benefit of other creditors so as to prevent the plaintiff's discontinuing it.

But the ruling on these points depends rather on the general jurisprudence of each State, the elasticity of its rules, and the convenience of the case ; *i. e.*, whether the confusion of issues or the multiplication of suits is the lesser evil. I shall not, therefore, undertake their examination in this book.

§ 165. **Right of General Partner alone to assign for Creditors.** — In general partnerships, by the great current of American law, it is not within the powers of any one or less than all of the partners to make a general assignment for the benefit of creditors, — at least where the non-assenting partners are resident and accessible; and this although it be recognized law that any one partner may convey in payment of a firm creditor part or all of the partnership property, — in so far, at least, as it consists of property intended for sale, or the loss of which will not necessarily disrupt the firm. [I merely suggest this limitation on the kind of property; it is not generally so limited.]

The reason is this: Paying debts is part of the work of carrying on the firm; therefore each member of the firm, as the agent of all to pay debts, is authorized to use for this purpose any part of the firm's property which is held for sale, and a conveyance of all such property is consistent with the continuance of the firm. But no one of the partners is agent of all to do any act inconsistent with the continuance of the firm; and an assignment of all property for the benefit of creditors is so inconsistent, and is *ipso facto* a dissolution.

This nearly universal rule, if applicable to limited partnerships, would make the assent of the special partners necessary to a valid assignment for the benefit of creditors. For the general partners, while expressly given the sole charge of conducting the business, are not expressly empowered to terminate it. The general partners alone are to sue and be sued; but this also, as has been shown, relates to the conduct of the concern. The special partners are forbidden to interfere in the

business; but this does not exclude the necessity of their assent to its forcible closing up.

Nor is the rule conclusive that in suits to wind up the concern all the partners, general and special, are absolutely essential parties; for it is founded on the reason, as already shown, that the claims of partners *inter se* must be adjusted, which requires the presence of the special partners.

§ 166. The decisions are not unanimous in deciding the question. In 1837 Chancellor WALWORTH said there may be some doubt as to the right of the general partner to assign all the effects for the benefit of creditors without the express or implied assent of the special partner, *Mills* v. *Argall*, 6 Paige, 577, 582.

In 1840 an assignment for the benefit of creditors was made by the general partner, giving preferences to certain creditors, and among them to the special partner. A re-assignment without preferences was subsequently made, the court stating that the non-concurrence of the special partner in the former assignment alone saved him from losing the protection of the statute, which would have been forfeited had he concurred in making preferences; but no objection was made to its validity for his non-execution, *Bowen* v. *Argall*, 24 Wend. 496.

In 1849 the general term of the Supreme Court of New York held very properly that an assignment for the benefit of creditors by one of two general partners without the knowledge or consent of the other who is within reach would be set aside on the application of the other general partner as wrong if the firm was solvent as tending to delay creditors, and if insolvent as beyond the power of any single partner, whether the partnership was general or limited. But the special question as to the

assent of special partners being necessary was not touched. *Hayes* v. *Heyer*, 3 Sandf. 284, 293.[1]

In *Hayes* v. *Heyer*, 4 Sandf. Ch. 485, the same point as in the above case was mentioned, but no opinion upon it given.

In 1854, in the special term of the Superior Court of New York, it was held that as the general partners have the management of the business they had power to make a general assignment for the benefit of the creditors in case of insolvency without the consent of a special partner. And it was further held that the fact that the alleged special partner was really a general one by reason of failure to contribute his capital, and the falsehood in the affidavit in certifying its actual contribution, did not render his assent necessary, for he was under the disabilities, though without the immunities, of a special partner, *Robinson* v. *McIntosh*, 3 E. D. Smith, 221.

In the following year (1855), in the general term of the same court, WOODRUFF, J., intimates a doubt whether the general partner can assign for creditors without the assent of the special partner, citing *Mills* v. *Argall*, *supra*, and also other cases which are not limited-partnership cases, *Schulten* v. *Lord*, 4 E. D. Smith, 206, 209.

In 1868, in a special term of the New York Common Pleas, it was held that a general assignment for creditors executed by the resident general partner for himself and as attorney for the non-resident partners, who promptly ratified it, was valid; that this would be true of all partnerships, but especially of a limited one, where equality in distribution is a duty imposed by law; and that it was not necessary that the non-resident general or special partners execute it personally, *Darrow* v. *Bruff*, 36 How. Pr. 479.

In addition to the above may be mentioned a dictum in the

[1] The cases of *Hayes* v. *Heyer*, in 4 Sandf. Ch. 485, and *Hayes* v. *Heyer*, 35 N. Y. 326, are not the same case as the above. That in 35 N. Y. was seventeen years later.

general term of the Supreme Court in 1859, that the moment a limited partnership becomes insolvent it is the duty of the general partners to make an assignment for creditors, thus implying that the general partners alone may do this, *Jackson* v. *Sheldon*, 9 Abb. Pr. 127.

On the other hand, it was said that a bill by a creditor to wind up the concern as insolvent should make the special partner party, *because he has a right to be heard on the question of breaking up the partnership. Walkenshaw* v. *Perzel*, 32 How. Pr. 233; s. c. 4 Robt. 426 (1866); and cf. dictum in *Durant* v. *Abendroth*, 97 N. Y. 132, 138.

In Maine, where a general partner, in whose individual name the business was carried on, made a general assignment of his property for the benefit of creditors, not showing whether he intended partnership property thereby, and under this assignment partnership property was taken by the assignee and sold, the court held that partnership property was not transferred to the assignee by such instrument, and the buyer therefore took it subject to the claims of partnership creditors, *Merrill* v. *Wilson*, 29 Me. 58.

The Massachusetts insolvency cases throw no light on the question, for in that State a single partner in a general partnership can petition for insolvency proceedings. In *Nutting* v. *Ashcroft*, 101 Mass. 300, the court held that the petition for insolvency proceedings of a person in whose individual name a limited partnership is carried on does not include the firm in which he was the general partner; that (p. 302) the co-partners should have been named, so that notice could be sent to them; and that (p. 301) it is possible for the general partner to be insolvent and the firm solvent. This reasoning is criticised by Lowell, J., in *Wilkins* v. *Davis*, 2 Low. 511; s. c. 15 Bank. Reg. 60, arguing that such petition and proceedings necessarily assign the bankrupt's interest in the firm remaining after its creditors are provided for, otherwise he could pocket it, leaving

his separate creditors unpaid, but does not hold that it assigns the firm's estate.

In *Lawrence* v. *Batcheller*, 131 Mass. 504, 509; s. c. 12 Reporter, 185, it is said that whether by proceedings in insolvency against P, of the firm of P, without mention of the special partner or of the firm, the firm or only P individually became an insolvent, and whether the assignees got any title to the partnership assets, is not considered; thus apparently treating it as an open question.

§ 167. **Assignee's Rights and Powers.** — It was held in *Bullitt* v. *M. E. Church*, 26 Pa. St. 108, that the assignee for the benefit of creditors of an insolvent limited partnership represented only the debtor and not the creditors, and could not bring action to recover claims conveyed to pay a private debt of one of the partners. Although it had been held in *Purdy* v. *Powers*, 6 Pa. St. 492, that the firm could recover its assets from the creditor of a separate partner, this ruling must be taken with a very large grain of allowance. The assignee of a limited partnership — as was stated in the former case — is not different from any other assignee for benefit of creditors, nor is such use of assets different from the case of general partnerships, unless the limited partnership was insolvent or contemplating insolvency. I apprehend that in many of the States the doctrine that he represents the debtors and not the creditors would be repudiated, for he is generally allowed to attack fraudulent conveyances. A payment of the private debt of one partner is, however, not a fraudulent conveyance, and the question would arise in such States, Could the partners themselves bring such suit? The answer is to be

found in the general law of partnership: First, if such use of the assets was the act of all the partners, they cannot undo it; it is a lawful conversion of joint into separate assets. Second, if the act is that of one partner alone, or less than all, it is a misappropriation as to those not consenting. And here the courts divide, some holding to the technical law that as all the partners must be plaintiffs, the wrong-doer is one of those seeking to avoid his own act, which cannot be; others finding reasons to get away from this technical rule,—as that the defendant is the one who first offers to show the wrong-doing, and he will not be allowed to do this, and therefore the action lies. Again, if the payment was in money of the firm, it may be lawfully taken by the separate creditor, for money has no ear-marks. And in Massachusetts it is said to be the law that in certain cases the creditor who received other property than money can retain it, *Locke* v. *Lewis*, 124 Mass. 1 (a limited partnership case). In Pennsylvania it seems that at the suit of a creditor an injunction will be granted against a judgment confessed by the firm which had assumed a debt of the special partner, *Coffin's Appeal*, 106 Pa. St. 280 (reversing S. C. sub nom. *Coffin* v. *Gruber*, 14 Weekly Notes, 140).

In *Robinson* v. *McIntosh*, 3 E. D. Smith, 221, it was held that the assignee for the benefit of the creditors of the firm could have a suit in equity to compel a special partner to pay into the estate the amount of capital which he had agreed but failed to contribute, although he is also liable *in solido* for falsehood in the affidavit, and although (*Ib.* pp. 232–3) the general partner might be estopped by being a party to

the fraud of falsely certifying that the capital had actually been paid in.

That a special partner liable as a general one for non-publication of a renewal may be included in insolvency proceedings as a general partner, see *Lancaster* v. *Choate*, 5 Allen, 530.

CHAPTER IV.

WINDING UP.

§ 168. **Who has the Right to wind up.** — In case of dissolution in the absence of the death or insolvency or abandonment by the general partner, such authorities as there are do not seem to be agreed as to whether the general partners can exclude the special partner from assisting to wind up.

Thus in *Snyder* v. *Leland*, 127 Mass. 291, the special partner asked a receiver on the ground, among others, that the general partners were not using due diligence in collecting assets, whereby loss would arise, that they could not agree as to the proper manner of winding up, and that *the defendants would not allow him to examine the books;* and this was held demurrable, as not sufficient to entitle him to a receiver, although had the danger of loss been such as to imperil the solvency of the firm a receiver would have been granted. Yet in a general partnership the exclusion of one partner by the others is sufficient to warrant at least injunction, if not a receiver.

But it was said in special term in 1853 that, unless excluded by the partnership articles, the special partner had a right at any time to take an active part in the management of the concern, subject only to the statutory consequences if he interferes before dissolution, and that neither his partners nor the creditors have any right to complain; that he is as much a partner as the general partners, and may therefore sustain a bill for a receiver to wind up the partnership in a proper case, as where the partners cannot agree on the management of the

assets; and for the further reason that the statute gives him a right to compel the general partners to account, *Hogg* v. *Ellis*, 8 How. Pr. 473.

§ 169. **Special Partner's Right.** — After dissolution no reason is perceived why the special partner may not assist in the winding up of the concern, or take sole charge of it if the other partners agree, or if it be necessary, as where he is survivor. One reason for prohibiting interference by him during the partnership, as already stated (§ 107), is to prevent persons being misled into the belief that he is a general partner. This reason ceases on dissolution, for any one thereafter so misled cannot suffer loss, for all power to contract has then ceased. The prohibition is against interference in transacting any business of the firm; after cessation of business by dissolution the disability ceases.

On the above reasons it was held in the Philadelphia Common Pleas, 1858, and in the Superior Court of Cincinnati, 1855, that after dissolution a special partner who takes possession of the property of the firm for the purpose of winding up its affairs cannot be held to the responsibility of a general partner in consequence thereof as for an interference. *Lawson* v. *Wilmer*, 3 Phila. 122; *Outcalt* v. *Burnet*, 1 Handy (Cinti.), 404, where the general partner had abandoned the business and left the State. And JUDGE LOWELL says: "I suppose the special partner has the same rights to wind up that a general partner would have," *Wilkins* v. *Davis*, 2 Low. 511, 516; s. c. 15 Bank. Reg. 60, 66. A rather obscure ruling in *Singer* v. *Kelly*, 44 Pa. St. 145, 149 (affirming s. c. sub nom. *Singer* v. *Macalester*, 4 Phila. 312), is that there is no reason for holding that the special partner had anything to do with the care and

collection of the debts of the firm after it had failed. But the syllabus probably correctly states the meaning to be that it is not obligatory upon him to do so; the syllabus is: "It is not the duty of the special partner to care for or collect the assets of the firm after its failure."

§ 170. This right of the special partner to wind up when there is no general partner to do so, or if he is designated by the other partners to do so, is limited, of course, by the right of creditors or partners, in case the firm is insolvent, to ask a court of equity to take the assets and administer them, as shown (§ 160). But that a surviving general partner not charged with misconduct engaged in winding up will not be disturbed on application of the executor of a deceased special partner without the clearest evidence of insolvency, was held in *Walkenshaw* v. *Perzel*, 32 How. Pr. 233, 240; 4 Robt. 426, 433.

§ 171. In several of the Western States surviving partners are required to give bond in the probate court to qualify them to wind up the concern. I apprehend, however, that these statutes, though they doubtless apply to limited partnerships, do not oust a court of equity of its right to take charge in case of insolvency; for this reason, that they do not require *pro rata* distribution among creditors, but leave the surviving partner free to pay one creditor in full and another not at all, requiring the security merely that he administer honestly and promptly, and not otherwise limiting his powers. This subject has nowhere been discussed. I make the above statement after having collected all the authorities upon it, but I cannot use the space to insert them.

§ 172. **May apply to Court.** — In case the firm name is the same as the individual name of the general partner, LEONARD, J., in the following case, advises that administration by court be sought, because as the firm's creditors have a priority over individual creditors of the general partner in the firm's assets, a judicial inquiry is necessary or safer to separate these classes of debts charged against the general partner, *Kerr* v. *Blodgett*, 48 N. Y. 62, 69. In such cases the presumption is that a note or other obligation in his name is his separate debt until it is proved to be a firm debt, *Oliphant* v. *Mathews*, 16 Barb. 608, as it is in case of a general partnership carried on in the name of one partner.

§ 173. **Actions to collect Assets.** — If the liquidating partner is compelled to bring suit to collect assets or claims due the firm, a formal difficulty may occur in deciding upon the plaintiff's name. The statute requires suits to be in the name of the general partner. If the single general partner is winding up, his own name as plaintiff will satisfy both the statute and the facts, even if he be a survivor. In those States which allow a domestic partnership to sue in the firm name, the firm name may doubtless continue to be used under that vague but universally repeated principle that a dissolved partnership is deemed to continue for the purpose of winding up; but where the firm name is not so allowed by statute, or in case of a foreign limited partnership, I see no way, where a general partner is dead, and his name therefore not available, if a special partner is acting as liquidating partner, except to declare in his own name in his capacity as survivor, just as a receiver would

sue in his own name and not in the names of the general partners. See under Part IV. (§§ 189, 192) for a fuller discussion of parties.

Where James Vanderpool, the special partner in the firm of Condit & Bowles, died, and his son, in whom his interest vested, took his place and continued the firm, and the general partners brought suit in their own names for a debt due the former firm, it was urged by the defence that the alteration made the firm general, and therefore all the partners should have been plaintiffs, or at least that the general partners should have sued as survivors. The court, holding that the alteration did not affect prior transactions, ruled that the statute requiring actions to be in the names of the general partners applied, and that the action was properly brought. *Perth Amboy Manufacturing Co.* v. *Condit & Bowles*, 21 N. J. L. (1 Zabr.) 659, 661

§ 174. **Rules of Distribution.** — The rules of distribution of assets are the same as in general partnerships [see also in this connection the case abstracted under § 102 (that the usual partner's lien obtains, see § 71)], with two additions, — First, there must be equality of distribution among general, *i. e.* unsecured, creditors, as already shown, § 157 *et seq.* Second, the special partner cannot claim as creditor. This will form the subject of an independent chapter.

CHAPTER V.

SPECIAL PARTNER AS CREDITOR.

§ 175. **Statutes.** — "In case of the insolvency or bankruptcy of the partnership, no special partner shall under any circumstances be allowed to claim as creditor until the claims of all the other creditors of the partnership shall be satisfied."

ALA. § 2086.	ARK. § 4371.	CONN. § 7.
DIST. COL. § 512.	FLA. § 18.	GA. § 1942.

ILL. § 23, "except for money loaned by him to such partnership."

IOWA, § 2169.

KY. § 9, "nor receive benefit of any lien in his favor until," etc.

MD. § 18.

MISS. § 1024, omits "under any circumstances."

MO. § 3409, same as KENTUCKY.

N. C. § 3107.	NEB. § 23.	N. J. § 23.
OHIO, § 3158.	PA. § 25.	R. I. § 11.
S. C. § 1323.	TENN. § 1755.	TEX. § 3463.
UP. CAN. § 16.	UTAH TY. § 20.	VA. § 9.
W. VA. § 9.	WIS. § 1722.	

"Or bankruptcy" is omitted in ARKANSAS, GEORGIA, OHIO, RHODE ISLAND, VIRGINIA, and WEST VIRGINIA.

N. H. § 12, "shall not claim for any part of the capital contributed by him until."

N. Y. § 25, and MINN. § 20, is same as above; but N. Y. § 17, MINN. § 16, and MICH. § 2364, permit the special partner to loan money to and advance and pay money for the partnership, and take and hold the notes, drafts, acceptances, and bonds of the partnership as security for repayment, and may use and lend his name and credit as security for the business, and shall have the same remedies in these respects as other creditors (given in full under INTERFERENCE).

Cal. § 7491, Dak. Ty. § 1461, and Wy. Ty. § 12, word for word with each other, are to the same effect as New York, Minnesota, and Michigan.

N. Y. § 3 R. S. p. 2239, allows the special partner to lease to the general partner real estate for the purposes of the business on terms agreed on between them.

The following States have no clause parallel to the above: Colorado, Delaware, Indiana, Kansas, Maine, Massachusetts, Montana Territory, Nevada, Oregon, Vermont, and Washington Territory.

La. § 2814, cannot be called upon to refund any dividend fairly made during solvency; and § 2822, cannot withdraw his stock when the general partners are in failing circumstances.

§ 176. **What Claims are included.** — This provision is not included in the section prohibiting transfers to creditors in case of insolvency, for that section requires all creditors to be treated alike; but this section goes farther, in that it will not permit the special partner to stand on an equality with creditors proper. The claims of the special partner may be of two kinds, — First, for his share of the capital; Second, for money he may have used for the benefit of the firm. The latter claim also may arise in several ways, — 1. For loaning money to the firm or paying a debt for it, or lending it his credit, as by indorsing its paper or selling to it. 2. By buying up claims against it after dissolution. 3. By a loan of money or credit to it by another firm in which he is a general partner.

(The special partner's right to deal with the firm in such a way as to become a creditor, and in some cases to take security, will be found under Alteration or Interference.)

The prohibition of the statute does not arise until insolvency. Prior to that time the firm may pay and the

special partner may safely receive reimbursement for any loan to or payment for his firm.

As to class first above a claim for his capital there is of course no question; the express provisions of the statute and the very foundation of the partnership devote that to creditors before he can be reimbursed. But as between partners, capital being a debt of the firm, the general partners, if they have put in less capital, will find themselves debtor to the special partner for a share of the difference, unless they guard themselves in the articles against it.

§ 177. As to the claim arising from a loan, there was at first contrary holdings in the lower courts of New York. The Common Pleas held that as to such claims he stood as a stranger to the firm, and could receive payment equally with any other creditor, in a case which went to the Court of Appeals in 1840, *Bowen* v. *Argall*, 24 Wend. 496, 504; but that court held the point not to be involved, and gave no intimation of its views. While in 1837 Chancellor WALWORTH, in *Mills* v. *Argall*, 6 Paige, 577, had held that he was as to such claims also postponed to creditors of the firm.

The Superior Court of New York in general term in 1850, in *Hayes* v. *Bement*, 3 Sandf. 394, decided as did the Chancellor in 6 Paige, 577, above, holding that the statute intended to place the special partner in exactly the position of a general partner as to all his claims, and that he could not claim as creditor for loans, accommodations, etc., until all creditors were satisfied; and although the matter was set at rest by statute in 1857, placing him on an equality with other creditors, as hereafter stated, all subsequent New York decisions have regarded the law as laid down in *Mills* v. *Argall*, 6 Paige, 577, as correct; viz.: *White* v. *Hackett*, 20 N. Y. 178 (reversing s. c. 24 Barb.

290); *Ward* v. *Newell*, 42 Barb. 482; s. c. 28 How. Pr. 102; *Hayes* v. *Heyer*, 35 N. Y. 326, which last case was recognized in 1885 in *Durant* v. *Abendroth*, 97 N. Y. 132, 142.

The same ruling was made in Pennsylvania, approving *Mills* v. *Argall*, 6 Paige, 577, in a case where the special partner attempted to enforce a judgment confessed in his favor by the general partner, *Dunning's Appeal*, 44 Pa. St. 150; but the case is not strong, for it does not appear but that the special partner had no claim, and the judgment may have been fraudulent, and it was therefore a preference rather than an equality of the special partner that was attempted.

The same ruling was made in Virginia, *McArthur* v. *Chase*, 13 Grattan, 683, and is implied in the language of McLean, J., in *Bowes* v. *Holland*, 14 Up. Can. Q. B. 316, 327. The provision, construed as it was in New York, was said to operate with so great injustice (*Hayes* v. *Heyer*, 35 N. Y. 326, 329; *Clapp* v. *Lacey*, 35 Conn. 463, 465) that in 1857 the legislature put debts due the special partner on the same footing as other debts, as it is in (as to loans of money or credit) Cal. § 7491, Mich. § 2364, Minn. § 16, and Dakota Territory and Wyoming Territory.

And so in Connecticut the contrary was held by the majority of the court. The court says that the New York construction was inconsistent with the interests of the commercial community; that its amendment by the legislature in 1857 admits this; that its omission from the Massachusetts act adopted in 1835 recognizes the same necessity; that Chancellor Walworth assigned no reason for his decision; that the Connecticut provision, occurring as it does in a section expressly referring to capital, is distinguishable from others; that the statute making the special partner's risk extend to his capital showed that his loans or advances were not also at risk, and that as to them he was on a par with other creditors, *Clapp* v. *Lacey*, 35 Conn. 463.

The decision, however, is open to doubt, for the reason that it was not found that the assets of the general partners were insufficient to pay the debts and the loan of the special partner; therefore, insolvency did not affirmatively appear.

On the other hand, it is difficult to see why this provision of the statute was inserted if it was not intended to include loans, for a case could hardly arise where his claim for capital would not be postponed independently of the statute. See *White* v. *Hackett*, 20 N. Y. 178.

§ 178. **Only Claims due him personally included in Prohibition.** — The claims referred to by the statute mean only claims which are due the special partner in such a way that he is a creditor, and not merely those wherein he may have a beneficial interest.

For example, it would not affect a claim due to a corporation in which he is stockholder, *Hayes* v. *Heyer*, 35 N. Y. 326, 329.

So, where the limited partnership owes a debt to a firm in which the special partner is a general partner, the creditor firm is entitled to collect its debt or participate in a distribution of assets; for the claim is the property of the firm, and not the individual property of the special partner. *Hayes* v. *Heyer*, 35 N. Y. 326; *McArthur* v. *Chase*, 13 Gratt. 683; *Hayes* v. *Bement*, 3 Sandf. 394.

The special partner may or may not have an interest in such claim. After the creditor firm has paid all its own debts and the advances due the other partners, his proportion of any surplus beyond any amount he may owe his firm will be his interest, obviously ascertainable only on general accounting.

It was held that the court distributing the funds of an insolvent limited partnership would ascertain and keep control

of this interest in *McArthur* v. *Chase*, 13 Gratt. 683 (it seems to me that their method of ascertainment was too clumsy to be just, but also that no method of ascertainment that could be devised would be any better if there is doubt of the solvency of the creditor firm; for nothing short of a complete accounting would then show, and that is impossible to be had in case of an undissolved firm needing the use of its books and engaging in new transactions every day); while in *Hayes* v. *Bement*, 3 Sandf. 394, 396–7, the court refused to withhold the interest.

§ 179. **Claims obtained after Dissolution.** — The provision was also said not to include claims due the special partner for payments made by him after dissolution, for he had then ceased to be a special partner, *Hayes* v. *Heyer*, 35 N. Y. 326, 329; noticed on this point in *Durant* v. *Abendroth*, 97 N. Y. 132, 142. Perhaps even if the dissolution is informal, and therefore not binding on creditors; see In re *Terry*, 5 Biss. 110 (U. S. Distr. Ct. 1870). Of course an individual debt due from the general partner to the special partner — *i. e.*, arising out of matters entirely disconnected with the partnership — may be sued upon at any time, *Battaille* v. *Battaille*, 6 La. Ann. 682.

§ 180. **Who can raise the Question.** — This provision must be invoked by the creditors or those who represent them. Thus it was held in the Common Pleas of Philadelphia that where the general partners gave the special partner a note in settlement of his claim, and are sued by him upon it, they cannot set up the fact of unpaid debts as a defence, *Brooke* v. *Alexander*, 3 Weekly Notes, 304.

It must not be inferred from this case that the special partner can sue the general partner to recover at law a debt due from the firm. Though the technical objection that the same person would be both plaintiff and defend-

ant does not exist, since the action may be against the general partner alone, yet the other objection, that one partner cannot sue another in partnership matters until an accounting and settlement has been had, and a balance struck, would still exist.

The right to claim as a creditor rests on the fact of being a special partner; and if by reason of defect in publication the limited partnership never was legally formed, the claim of the special partner against the firm's assignee in bankruptcy will be disallowed, In re *King*, 7 Bankr. Reg. 279; s. c. 5 Benedict, 453.

§ 181. **What is Insolvency.** — "Insolvency" here, to my mind, has a different meaning from the same word in other sections of the statutes. Insolvency there, as suggested on p. 171, means only the fact of insufficiency of assets. A declared insolvency is not necessary, on the one hand, nor does a mere inability to pay immediate engagements, on the other, constitute more than evidence of insolvency, nor even insufficiency of property to pay debts if compelled to wind up at once; but where the property will be thus insufficient when sold in the usual course of business and without forcing, the firm is insolvent. On the other hand, it seems that in this section a declared insolvency is referred to, or rather that the section applies to winding up by action of court; for if the firm is in fact insolvent, though not so declared, a payment to the special partner in full or in excess of other creditors is void under other sections. This section forbids his being even equalized with other creditors, and therefore must refer to a general administration of the assets for all, and not to isolated settle-

ments, and regulates the action of the courts rather than of the partners, except that it would apply to an assignment for insolvency by them, placing the special partner among the creditors.

A statement that the notes of the firm sued upon by the special partner were long past due, and a judgment on them unsatisfied and in full force, was held sufficient proof of insolvency to prevent his claiming as creditor, *Ward* v. *Newell*, 42 Barb. 482; 28 How. Pr. 102.

Contrary to my view, however, the fact that the assets were not sufficient to meet the debts was adduced as a good defence to an action by the special partner against a general one by McLean, J., in *Bowes* v. *Holland*, 14 Up. Can. Q. B. 136, 327.

§ 182. **Consequences of Violation.** — If I am right in referring this section to the winding up as a rule for the courts, it is natural that the statute should not declare the consequences of a violation of it. If, for example, the partners assign in insolvency, including the special partner as a creditor, the attempt on behalf of the special partner does not amount to an interference, and no consequences follow other than that the attempted preference or equality is void, *Bowen* v. *Argall*, 24 Wend. 496, 504.

A ruling by a court in allowing a special partner to claim as creditor on distribution in bankruptcy, is not an adjudication that he was a special partner as against a person not a party thereto who seeks to hold him generally for not having paid his capital in cash in forming the partnership, *Durant* v. *Abendroth*, 97 N. Y. 132, 142.

PART IV.

REMEDIES.

CHAPTER I.

STATUTES.

§ 183. "SUITS in relation to the business of the partnership may be brought and conducted by and against the general partners in the same manner as if there were no special partners."

ALA. § 2077.	ARK. § 4362.	CAL. § 7492.
DAK. TY. § 1462.	IOWA, § 2160.	KAN. § 3365.
N. C. § 3101.	NEB. § 14.	N. J. § 14.
N. Y. § 14.	PA. § 16.	S. C. § 1316.
TENN. § 1747.	TEX. § 3455.	UP. CAN. § 11.
UTAH TY. § 14.	WIS. § 1718.	WY. TY. § 13.

FLA. § 10, S. C. § 1330, and MISS. § 1021, add to the above "that it shall be optional to include a special partner who has become liable as a general partner by reason of non-compliance with the statutes." It must be remembered that the special partner in FLA. § 1 *a*, is liable for an additional amount equal to his capital.

MISS. §§ 1022, 1023, have further provisions as to suing all the partners indiscriminately, in which case the special partner may plead the limited liability.

MD. § 11, action to be only against the general partner whose name is used in the firm; the judgment is the same as if against all the general partners.

§ 184. "All actions respecting the business of such partnership shall be prosecuted by and against the general partners only, except in those cases in which, by the provisions of this chapter, special partners shall be deemed general partners and

special partnerships be deemed general partnerships; in which cases all the partners deemed general partners may join or be joined in such suits."

COL. § 2525.	DEL. § 7.	DIST. COL. § 513.
GA. § 1933.	ILL. § 17.	IND. § 6043.
ME. § 8.	MICH. § 2358.	MINN. § 14.
MON. TY. § 952.	NEV. § 478.	N. H. § 11.
OHIO, § 3161.	OREGON, § 8.	R. I. § 12.
VA. § 12.	VT. § 3697.	W. VA. § 12.
WASH. TY. § 2377.		

CONN. § 8, "No special partner shall be joined as a party in any suit by or against such partnership unless liable as a general partner."

GA. § 1933, says, "In which case the action may be against all jointly or severally, or any one or more special partners may be sued in the same action with the general partners;" and in § 1943, after providing for dissolution, adds, "But nothing herein contained shall be construed to affect the collection of any demand against either of the special partners contracted previously to the commencement of such special partnership."

KY. § 12, and MO. § 3412: "The general partners shall sue and be sued as if they were the only partners, except in cases where the special partner is liable as general partner, when he may be sued with the others, or if judgment has been obtained against them, he may be sued separately."

§ 185. DIST. COL. (besides § 513 above), § 505. The general partners whose names are used in the firm or business are the only necessary defendants, and the judgment is as if against all general partners. § 514. If in any case against general and special partners, any special partner is not liable, judgment may be against those liable. § 515. If judgment is against general partners only, special partners subsequently discovered to be liable may be sued in new suit. § 516. In last two sections judgment is *prima facie* evidence of debt and not a merger.

As to the recovery of profits or interest withdrawn in violation of creditor's rights, see p. 112.

California, Dakota Territory, Oregon, Vermont, Washington Territory, and Wyoming Territory have provisions that in case of contracts made by a special partner known and recognized as such he is not generally liable. See under Interference.

Several of the statutes, especially and quite unnecessarily, provide that a judgment against the general partners for a firm debt is a judgment against the firm as if all were parties, as Dist. Col. § 505, and Md. § 11, and that the judgment may be against those liable and if only part are liable, Dist. Col. § 514, Md. § 20, S. C. § 1330.

And if the general partners only are sued, a new suit may be brought against special partners if they are found to be generally liable, Dist. Col. § 515, Ky. § 12, Mo. § 3412, or a bill in equity filed against them, Md. § 20. In the latter case the judgment against the general partners shall be *prima facie* evidence of the debt, Dist. Col. § 516, Md. § 20.

§ 186. S. C. § 1330. All facts necessary to affirm or negative the liability of a special partner (included in a suit against the general partners) may be given in evidence under the general issue. Miss. §§ 1022–3, as to plea by the special partner, *supra*, p. 209.

§ 187. "The general partners shall be liable to account to each other and to the special partners for the management of the concern both in law and in equity as other partners now are by law."

Ala. § 2081.	Ark. § 4366.	Dist. Col. § 518.
Ga. § 1937.	Iowa, § 2164.	Kan. § 3363.
Md. § 22.	Minn. § 22.	Miss. § 1017.
N. C. § 3105.	Neb. § 18.	N. J. § 18.
N. Y. § 18.	Ohio, § 3154.	Pa. § 20.
S. C. § 1318.	Tenn. § 1751.	Tex. § 3459.
Up. Can. § 15.	Utah Ty. § 18.	Va. § 12.
W. Va. § 12	Wis. § 1717.	

Cal. § 7500, Dak. Ty. § 1467, Wy. Ty. § 18, liable like all general partners.

Fla. § 14, any general or special partner is liable to account to the others.

Ill. § 15, will be found *supra* under § 129.

Miss. § 1017, adds that special partners have the same remedies as general partners.

Va. § 12, and W. Va. § 12, enact that the special partner is liable to and suable by the firm for debts contracted with it; see also under Dissolution, § 129.

Me. § 10, and N. H. § 13, give the Supreme Court power to hear in equity all questions between partners or partners and creditors.

§ 188. "Every partner who shall be guilty of any fraud in the affairs of the partnership shall be liable civilly to the party injured to the extent of his damage, and shall also be liable to an indictment for a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court by which he shall be tried."

Ala. § 2082.	Ark. § 4367.	Fla. § 15.
Ga. § 1938.	Ill. § 21.	Iowa, § 2165.
Kan. § 3364.	Minn. § 23.	Neb. § 19.
N. C. § 3106.	N. J. § 19.	
N. Y. Penal Code, § 375.		Pa. § 21.
S. C. § 1319.	Tenn. § 1752.	Wis. § 1724.

Ohio, § 3155, and Tex. § 3459, merely say the general partners are liable civilly for fraud, and Md. § 22, fraud of any partner is punishable criminally.

CHAPTER II.

PARTIES TO ACTIONS.

§ 189. **In Actions where the Firm is Claimant.** — In actions by a limited partnership, the rule that actions may be by and against the general partners alone, furnishes a guide to nearly all the cases, with perhaps four modifications.

First, where by special statute domestic partnerships may sue in the firm name, there is no reason why this rule should not apply to limited partnerships, and the action may be either in the firm name, with the usual averments, or in the names of the general partners.

Second, after dissolution in an action to collect debts due the firm, a necessity for a different rule may exist. This has been considered under § 173.

§ 190. Third, in case of a foreign partnership it was held in *Rosenberg* v. *Block*, 50 N. Y. Superior Ct. 357, that the action was rightly brought in the names of all the partners, general and special, because the foreign statute allowing actions in the names of the general partners only, as it affected the remedy, had no extra-territorial operation, and the domestic statute only applied to partnerships formed under it, and there the action must, under the code rules, be in the names of the real partners in interest; viz., all the partners.

At first blush this reasoning looks plausible; but to my mind it is wrong. It seems to me that a special

partner cannot safely join as plaintiff without running the risk of being charged with interference, — for besides such power as he will have by his position as co-plaintiff, it is at least a species of holding him out as partner, especially where no mention is made, as none need be, of the partnership being limited, — and that "may" in the statute should be "shall," as held in Kansas (*infra*, p. 217). If this be true, that it is a species of interference, it follows that the provision for suing by the general partners alone is far more than one relating to the remedy, and involves the right or status, and therefore should be respected in courts of other States. Again, the special partner may have the position of a dormant one, and by the general rule of partnerships a dormant partner need not be joined either as co-plaintiff or as co-defendant.

§ 191. Fourth, in an action by a limited partnership, if the proof fails to show a limited partnership several questions arise.

1. If the defect is one imposing as a penalty a liability on the special as a general partner, it is still a limited partnership in its constitution, and as to its claims against others, though not as to theirs against it, and the action in the names of the general partners is proper enough.

2. If, however, the defect is in the formation of the partnership, — as under the provision that no such partnership shall be deemed to have been formed until the certificate is filed and recorded, etc. — or where there has been an alteration which the statute makes a dissolution, but the business is continued, and the claim sued on arises subsequently (for as to prior claims the action

is properly in the names of the general partners), here several cases may arise. First, if the partnership is a domestic one suing under a statute allowing the firm name to be used, no difficulty arises; and second, if it is a foreign firm suing in the name of all the partners, no difficulty arises, for although the firm is not a limited one, it is still a partnership, and may collect its debts as such, and the failure to prove the averment that it is a limited one is not a variance, *Rosenberg* v. *Block*, 50 N. Y. Superior Ct. 357. Third, if it is a domestic firm suing in the names of the general partners, which is not the firm name, this would seem to be proper, except perhaps in one instance, for a different reason; viz., that the would-be special partner occupies the relation of dormant partner, and therefore is not a necessary party. The one instance in which it might still be a defect of parties may arise thus: A dormant partner is not a necessary, though a permissible, party for the reason that as he is not known, the contract, though for his benefit, is not deemed to be made with him: but the contract may have been made with him, and perhaps with him alone, for the firm; in such case the reason of the rule dispensing with his joinder fails.

Where a special partner died and his son took his place in the firm, and the general partners sued upon a claim which accrued prior to such death, the defendant claimed that they should have sued as surviving partners, and also that the alteration of partners made the firm general, and therefore all should have joined. But the court, without passing on the question whether death of a special partner was a dissolution, held that on liabilities accruing before such death the statute applied, and

that an alteration did not affect prior transactions, *Perth Amboy Manufacturing Co.* v. *Condit*, 21 N. J. L. (1 Zabr.) 659.

§ 192. Nor has the statute any application to an action by a single partner for trespass upon his individual interest, — as where he sues an officer for selling the entire property on execution on the individual debt of his co-partner, *Spalding* v. *Black*, 22 Kan. 55.

§ 193. **Actions against the Firm.** — The statute that suits in relation to the business of the partnership may be or shall be brought against the general partners alone has no application to three cases, — First, where it is sought to hold the special as a general partner: this is true of all States, and not merely of those specially so providing as above. Second, where one partner is suing another, in the few cases where he can do this. Third, where the suit seeks the subversion of the partnership, — as where a creditor or a partner seeks dissolution, receiver, and accounting.

"It seems to be giving an unreasonable latitude of construction to the words 'suits in relation to the business of the partnership may be by or against the general partners' to apply them to a suit brought for the subversion of the partnership." Therefore an action by a creditor to compel a winding up, appointment of a receiver, etc., must make the special partners defendants, for they have the right to be heard. *Schulten* v. *Lord*, 4 E. D. Smith, 206, 208–9; *Walkenshaw* v. *Perzel*, 32 How. Pr. 233; s. c. 4 Robt. 426. See also *McArthur* v. *Chase*, 13 Grattan, 683, 698. And if the special partner be dead, and by the partnership articles his representatives have the right to continue the firm, they must be made parties, *Walkenshaw* v. *Perzel*, *supra*. So where the suit also seeks to set aside a

transfer by the special partner to the general partner, *Schulten* v. *Lord, supra.*

§ 194. In all other cases — *i. e.* wherever it is sought to hold the firm without claiming that the special partner is liable generally — the rule of the statute is that the general partners alone should be sued; the word "may" in those statutes where it occurs being interpreted as "must" wherever the suit can be brought by or against the general partners only.

In a Kansas case the court notice the word "may," and that in other sections of the same statute "shall" is used, and seem to regard the exclusion of the special partners as parties to litigations as more consonant with the general policy of the statute, although the word "may" is used, *Spalding* v. *Black*, 22 Kan. 55, 63. And it was held to be incorrect to join the special partner with the general in an action on a partnership obligation where he was not claimed to be liable except as special partner, *Phillips* v. *Stewart*, Anthon's N. P., N. Y. (2d ed.) 337. (This case is not to be found in the first edition or in reprints thereof.)

I entirely approve these decisions; for, as already stated (p. 214), it seems to me to be a species of interference if he consents to be a co-plaintiff. On the other hand, I do not understand that this excludes statutes, where they exist, allowing suits to be by or against domestic firms in the firm name.

§ 195. Attention must be turned back to the, to say the least, peculiar phraseology of one of the sections of the statute referring to the creation of the partnership; viz., "such partnerships shall consist of one or more persons, who shall be *jointly and severally* responsible as general partners *now are.*"

This joint and several responsibility is thus declared or assumed in —

ALA. § 2064.	ARK. § 4349.	COL. § 2515.
GA. § 1921.	ILL. § 2.	KAN. § 3348.
MASS. § 2.	MD. § 2.	ME. § 1.

MICH. § 2342.	MINN. § 2.	MISS. § 1006.
MON. § 944.	N. C. § 3089.	NEB. § 2.
NEV. § 469.	N. H. § 2.	N. J. § 2.
N. Y. § 2.	OHIO, § 3142.	PA. § 2.
S. C. § 1304.	UP. CAN. § 2.	UTAH TY. § 2.
WASH. TY. § 2371.	WIS. § 1704.	

This phraseology, occurring in the original New York statute, has been thoughtlessly copied in States where it has no meaning. Partners are not at common law jointly and severally liable, but jointly only. It is true that in equity it has been said they are severally liable, but the jurisdiction of equity only attaches in cases of death, bankruptcy, or dissolution, and a few others. This common law rule has been altered in a few States by a statute that persons jointly liable on any instrument shall be deemed jointly and severally liable, which provision is always construed to apply to partners. Other States have a statute more sweeping, — that partners shall be jointly and severally liable; and a few States, without either of the above, provide that in case of the death of a joint contractor the contract shall become joint and several. In these cases, except perhaps the latter, there is no inconsistency in the limited partnership act providing that the general partners shall be jointly and severally liable as partners now are. But in States where a single partner cannot be picked out and sued alone as severally liable, this phraseology of the statute seems quite inappropriate.

§ 196. In actions where it is sought to hold the special as well as the general partners liable as general partners, the provision requiring actions to be against the general partners alone does not apply, and should not be followed, but all the partners should be sued. For authorities, see § 197.

CHAPTER III.

PLEADINGS.

§ 197. **Complaint or Declaration.** — When all are thus sued, the proper course is held to be, not to distinguish the special from the general partner in the complaint, petition, or declaration, but to charge him as a general partner. *Stone* v. *De Puga*, 4 Sandf. 681; *Sharp* v. *Hutchinson*, 49 N. Y. Superior Ct. 50 (affirmed in Court of Appeals, 33 Alb. Law Jour. 11, for Jan. 2, 1886, and 3 North Eastern Reporter, 500). The same line of pleading was used also in *Madison County Bank* v. *Gould*, 5 Hill, 309; *Lawrence* v. *Merrifield*, 42 N. Y. Superior Ct. 36 (affirmed, without report, in 73 N. Y. 590); *Bausman* v. *Rogers*, 2 Weekly Notes (Phila.), 428; *Watts* v. *Taft*, 16 Up. Can. Q. B. 256; and see *Benedict* v. *Van Allen*, 17 Up. Can. Q. B. 234; *Hirsch* v. *Vanauxem*, 15 Weekly Notes, 467.

In fact it was held in *Stone* v. *De Puga*, *supra*, that averments in the complaint stating why the special partner was liable as a general one — as failure to put in his capital, withdrawal of capital, and the like — are improper, as pleading evidence, and will be struck out on motion, and that the action should be based on charging him as a dormant partner. And in *Sharp* v. *Hutchinson*, in the Court of Appeals, it was held to be proper to charge him as a general partner and prove he was such by any competent proof, — as in that case by showing

the proceedings to form a limited partnership, and that he had not paid in all his capital.

In the report of *Sharp* v. *Hutchinson*, in the Superior Court, it is not said that the plaintiff *must* not, but that he *need* not, base the action on the falsity of the affidavit. At the time of this latter case the New York practice had dispensed with a reply by providing that new matter in the defence should be deemed controverted.

If special partners have so intermeddled as to have become general partners, a plaintiff suing on a note of the firm against all the partners sues them as general partners independent of the statute, and therefore it is not necessary for him to show that the limited partnership was formed under the statute, *Davis* v. *Bowes*, 15 Up. Can. Q. B. 280; and this method of alleging was followed in another case of liability for interference in *Watts* v. *Taft*, 16 Up. Can. Q. B. 256, and where the special capital was not properly paid, in *Benedict* v. *Van Allen*, 17 Up. Can. Q. B. 234.

§ 198. A distinction might here be made between the case where the statute as to the formation or renewal of the limited partnership has not been followed, — as where the special capital was not all paid in in cash, or the certificate was not duly recorded, or publication made, in which cases the partnership is not deemed begun, — and case where there was a limited partnership duly formed, but by subsequent violation of the statute its protection has been forfeited. In the former case there never was a limited partnership, and the cause of action is based on the common law liability of partners; but in the latter case the liability may be said to be based on a violation of the statute, as by a withdrawal of funds, an alteration, an interference, an illegal firm

name, and the like. But the cases do not notice any such distinction.

§ 199. **Answer.** — The defendant who claims the protection of the statute as a special partner should plead this fact with at least sufficient particularity to allege the date and place of the formation of the limited partnership with his co-defendants, its duration, that proceedings were duly had under the statute, and that his liability for the debt sued on is only as such special partner. The special partner's answer should set forth the fact of a limited partnership, *Stone* v. *De Puga*, and *Sharp* v. *Hutchinson*, *supra*.

Averring this fact in general terms, giving the date and place of the formation of the partnership, is sufficient, without stating all the steps *seriatim*, or setting forth copies of the contract or its terms, for these are all of record, *Bausman* v. *Rogers* (Phila. Com. Pl. 1876), 2 Weekly Notes, 428.

§ 200. — **General Denial.** — Whether a general denial would have been sufficient, has not been discussed in any case but one, — in the Queen's Bench of Ontario. There the partnership was never properly formed, because the capital was not properly contributed. The action was against all the partners on a note made in the firm name, the special partner pleaded *non fecit*, and the court said they thought — though that might be more maturely considered — that in a suit on a note, as defendant pleaded *non fecit*, and there was, therefore, nothing on the defendant's pleadings showing that he relied on being a special partner only, the plaintiff was therefore not called upon to repel by pleading any allegation of a limited partnership, and could, therefore, give in evidence the fact that there was

no special partner under the act, for the reason that no capital was contributed which was not apparent on the face of the deed of association. *Benedict* v. *Van Allen*, 17 Up. Can. Q. B. 234, 236.

In *Sharp* v. *Hutchinson*, 49 N. Y. Superior Ct. 50, a general denial was mentioned in discussing the nature of a reply, had such an answer been filed.

In South Carolina (as already shown, § 186) the statute says that under the general issue is sufficient.

Where the defendant, Donald Bethune, was described in the declaration as the general partner of the firm of Donald Bethune & Co., but without any allegation that by this was meant he was sued as the general partner of a partnership of general and special partners, it was held that if there were other general partners who were not joined, the defendant should have pleaded this in abatement, just as if it were a partnership independent of the limited partnership act, *Howland* v. *Bethune*, 13 Up. Can. Q. B. 270.

§ 201. **Reply.** — If a defendant has pleaded that he is a special partner, a general denial is sufficient to put in issue the due formation of the partnership, or that the debt was not incurred while he was a special partner, — as where the firm had been dissolved by an alteration. A reply of general denial is sufficient, because the plaintiff may show defendant was a general partner by any competent proof.

But if the plaintiff does not rely on these, but, admitting the fact of a limited partnership, claims improper conduct, — as interference, for example, — forfeiting the protection of the statute, it would seem not unjust that he should reply specially the facts.

In the following cases the reply adopted was the general denial: —

In *Watts* v. *Taft*, 16 Up. Can. Q. B. 256, the replication stated that the defendant did not pay his capital in cash, that the note sued on was made for his accommodation and not for the firm, that he was a general partner, and transacted the general business of the firm.

If the defendant has not averred a limited partnership the plaintiff is not called upon to repel by pleading the fact of a limited partnership, *Benedict* v. *Van Allen*, 17 Up. Can. Q. B. 234, 236.

In *Sharp* v. *Hutchinson*, 49 N. Y. Superior Ct. 50, 51, where no reply was filed, because the code deems new matter in the answer controverted, the question is raised whether, if the answer had been merely a general denial, a reply of the facts taking the partnership out of the protection of the statute would not have been necessary. In other words, if under the general denial the defendant had proved a limited partnership, would the code provision that new facts shall be deemed controverted be sufficient, or do not the special facts of a false certificate, etc., amount to more than merely negativing the certificate of limited partnership and constitute an avoidance of it needing a reply, notwithstanding the code provision?

CHAPTER IV.

MISCELLANEOUS.

§ 202. **Evidence in Action by the Firm.** — If the general partners are plaintiffs, the usual rule that their identity as the members of the firm contracted with must be proved, obtains subject to a statutory rule very common in the Western States that this identity is not in issue unless specially denied.

To prove the formation of the limited partnership, offering the proper documents has been held merely to show a contract to enter into such relation, and an actual launching of the partnership, or acting in the relation of partners, is necessary, *Gray* v. *Gibson*, 6 Mich. 600. But this step is rarely of any importance, for if the contract is with the partnership, or the liability is incurred to the firm, this of itself is such proof.

In fact, the right of the partnership to collect a claim due it is the same whether it be general or limited, and the nature of the partnership, as general or limited, can scarcely be an issue, except to show the right of the partners to sue in the names of some of them only; hence it was properly held in *Rosenberg* v. *Block*, 50 N. Y. Superior Ct. 357; *supra*, § 191, that where all the partners were plaintiffs, the failure to prove the averment of a limited partnership was not a variance.

Publication of the limited partnership in many of the

States may be proved by an affidavit from the newspaper-office, made and filed as shown in § 27 above.

§ 203. —**In Actions against the Firm.**—The special partner who has pleaded the fact of a limited partnership was held to have made out a *prima facie* defence by showing the regularity and sufficiency of the proceedings by which the partnership was formed, and that the burden was then on the plaintiff to show acts of the special partner in violation of the statute, — whether these consist in false statements in the certificate, in subsequent conduct, or in assent or participation in forbidden acts, *Madison County Bank* v. *Gould*, 5 Hill, 309, 315; though it seems that the court ought to have placed on the defendant the burden of proving actual payment of the capital he has certified and sworn to. The reason they did not doubtless is because the statute does not say that the partnership shall not be deemed begun unless the capital was not paid in properly, but is not deemed begun until the documents are duly made, filed, etc., and that a false statement makes them liable as general partners. These phrases were said to be equivalent in *Patterson* v. *Holland*, 7 Grant's Ch. (Up. Can.) 1, 8; but this distinction shows that they cannot be entirely so.

Whether such evidence of the plaintiff can be admitted if objected to before the defendant has given his proof, was queried in *Sharp* v. *Hutchinson*, 49 N. Y. Superior Ct. 50, 52, in which case it had been so offered by cross-examination of the defendant, but rejected for other reasons. The court of appeals affirmed the above report, not noticing this suggestion; see 33 Alb. Law Jour., p. 11; s. c. 3 Northeastern Reporter, 500.

In this case the plaintiff had introduced documents showing defendants were a limited partnership, and then offered to prove that only $8,000 of a capital of $10,000 had been paid in, and the rejection of the proof was held erroneous. The certificate duly filed and the affidavit were said, in a charge to the jury, to be *prima facie* evidence of payment by the special partner of the stipulated capital, in *Hampden Bank* v. *Morgan*, 2 Haz. Comm'l & Statis. Reg. 57.

The affidavit of the general partner offered by the defendant as part of the presumptive evidence of the formation of the partnership cannot of course operate also as rebutting proof of evidence put in by the plaintiff to falsify it, — as where he shows that no actual cash was contributed, *Madison County Bank* v. *Gould*, 5 Hill, 309; *Van Ingen* v. *Whitman*, 62 N. Y. 513. Nor does the rule that two witnesses are necessary to prove perjury apply to evidence that the affidavit was false, *Madison County Bank* v. *Gould*, 5 Hill, 309.

It was held in *Lachomette* v. *Thomas*, 5 Rob. (La.) 172, that after dissolution the general partner could not bind the partner *in commendam* by acknowledgment of debts. But this will be governed by the rulings of each State, as to admissions of general partners, which are not fully in accord with each other.

§ 204. **Verdict and Judgment.** — If all the partners are sued and the special partner's defence is sustained, the verdict and judgment may be in his favor and against the general partners alone, *Lawrence* v. *Merrifield*, 42 N. Y. Superior Ct. 36 (affirmed without report, 73 N. Y. 590), and by the statute in the District of Columbia, Maryland, and South Carolina. I apprehend that this rule is well-nigh universal; viz., that when several are sued as members of a firm, proof that some of the defendants are not members will not prevent judgment against the rest.

If the action does not seek to charge the special partners as general, the requirement of the statute that the general partners alone may be sued, necessarily involves the intendment that the judgment shall have the same effect as if there were no special partners, — at least so far as relates to partnership property; and execution against it binds the entire interest of all the partners therein the same as in actions against a general partnership, *Artisans' Bank* v. *Treadwell*, 34 Barb. 553; *Van Alstyne* v. *Cook*, 25 N. Y. 489. Nevertheless the statutes of the District of Columbia and Maryland make special provision that such shall be the effect.

§ 205. The rule in general partnerships where one of the partners is not sued, and this is not pleaded in abatement, is that the judgment against the others merges the original debt, and that such omitted partner cannot be afterwards sued on the original debt.[1] In many of the States a remedy is afforded by allowing a proceeding to make a joint debtor party to the judgment already rendered against his co-debtors.

In case of a limited partnership where judgment is rendered against the general partners, and it is afterwards found that the special partner could have been joined as a general one, except in the District of Columbia, Kentucky, and Missouri, where the statute provides that the special partner can be sued after judgment against the general partners, it is not easy to see

[1] It will be remembered that the contrary ruling of the Supreme Court of the United States in *Sheehy* v. *Mandeville*, 6 Cranch, 253, after having been disapproved by nearly every later authority, English or American, has been overruled in *Mason* v. *Eldred*, 6 Wall. 231; 7 Am. Law Reg. (N. S.) 402.

why the debt is not merged, or how he can be proceeded against unless the statutes allowing a joint debtor to be made a party to the judgment afford a remedy. I know of no principle of law which will distinguish the case from the general rule above stated, and which is applicable alike to unknown and to known, but non-resident, partners.

Nevertheless it was held that a judgment against the general partners does not merge the liability of a special partner who is afterwards found to have so violated the statute as to be a general one, in *McArthur* v. *Chase*, 13 Grattan, 683, 701, 704.

Where a judgment against the firm was rendered before a magistrate and execution returned *nulla bona*, an application was made to the Common Pleas Court showing non-compliance with and breach of the statute by the special partner, and an auditor was appointed to report the fact, and on his return execution against the individuals was awarded. *Whitall* v. *Williams*, 6 Weekly Notes (Pa.), 44; and see *Bement* v. *Philadelphia Impact Brick Machine Co.*, 5 Weekly Notes, 58; s. c. 12 Philadelphia, 494.

The method of reaching an excessive withdrawal of profits or interest has already been examined; see WITHDRAWAL.

§ 206. **Actions between Partners.** — The right of one partner of a limited partnership to maintain an action against another is not less broad than in general partnerships; that this cannot be done, and why, when it involves a partnership dealing, except to recover a

final balance after full settlement, has already been stated.

Where the special partner has a claim against one or all of the general partners, the right to maintain an action may be broader than in general partnerships in the proportion that his attitude is that of a creditor, and not of a partner.

Thus the partner *in commendam* to whom the general partner is indebted in a matter disconnected with the partnership, may recover the debt after dissolution without waiting the final liquidation of the partnership concerns, *Battaille* v. *Battaille*, 6 La. Ann. 682.

Whether a partner could have an action at law against his co-partner for payment of his share of the capital, or whether a general partner, as party to the fraud of making a false affidavit that the special capital had been paid in, might be estopped to deny the truth of it had he brought suit, was queried. Yet it was held that a court of equity could compel such contribution, and that the assignee of the firm for the benefit of creditors could compel the special partner to pay his agreed share, *Robinson* v. *McIntosh*, 3 E. D. Smith, 221.

Where plaintiff, a creditor of a firm, on its dissolution gave up his notes and took the individual notes of two of the partners for half the amount due on demand, but with an agreement that the amount should remain in a new firm then formed at seven per cent interest, and thereupon a limited partnership was attempted to be formed of such two partners as general partners and plaintiff as special partner, his share of the capital being the amount of said debt, without actual cash being contributed, but the firm failed, and was dissolved at the end of a year, plaintiff can sue on the notes. There is no agreement to look solely to the new firm for payment. And although the

plaintiff is liable as a general partner by reason of the false statement in the formation of the limited partnership, yet there being no proof of any intent to deceive the public by obtaining false credit, the note is not an illegal contract. Nor is a judgment on one of the notes a withdrawal of capital; for all the partners being general as to creditors, and each individually liable, a judgment in favor of one partner against the others does not diminish their means of obtaining payment, *Brown* v. *Davis*, 6 Duer, 549.

§ 207. The statutory provision that no special partner shall claim as creditor in case of the insolvency of the partnership — which is treated under the head of WINDING UP — would seem to give him the rights of a creditor to sue the firm if it is solvent. It is possible to construe this inference as only applicable to final distribution; but this construction so emasculates the provision that I doubt if it be the proper one. In general partnerships a partner cannot with any propriety be called the creditor of another partner in matters concerning the partnership transaction until final balance, and is never in legal contemplation a creditor of the firm, however much he may be such under the mercantile notion of a firm. When, therefore, the statute recognizes a special partner as a creditor for loans or advances other than his capital, it contemplates him apparently as a stranger to the firm and with the rights of a stranger.

In *Ward* v. *Newell* the special partner brought an action at law on notes given him as a creditor in the name of the firm by the general partners. It is not shown whether the firm was dissolved or not, as the judgment on them was reversed without

objection to the point; and SUTHERLAND, J., in a dissenting opinion, specially says he can maintain such action, *Ward* v. *Newell*, 42 Barb. 482, 487; s. c. 28 How. Pr. 102, 106. Some of the statutes specifically give the special partner the remedies of a stranger for loans, advances, etc., to the firm (see § 175).

PART V.

PARTNERSHIP ASSOCIATIONS, LIMITED.

§ 208. A new form of limited partnership, in the nature of a joint-stock company, where all the partners are special and the capital is in shares, has been adopted in the following five States: —

PENNSYLVANIA, Act of June 2, 1874, Purdon, pp. 1891, 2028, and amendments.
VIRGINIA, Act of March 2, 1875, Laws of 1874–5, p. 118.
MICHIGAN, Act of May 22, 1877, 1 Howell's Statutes, 623.
NEW JERSEY, Act of March 12, 1880, Laws of 1880, p. 304, and amendments.
OHIO, Act of April 20, 1881, 78 Laws, 248.

Following are these statutes, with notes of decisions so far as rendered.

§ 209. **Formation. — Capital. — Amendment. — Books and Schedules.**

MICH. § 2365; N. J. § 1; OHIO, § 3161 *a*; PA. § 1; and VA. § 1.

"When any three or more persons [" not less than three, nor more than twenty-five," OHIO] may desire to form a partnership association for the purpose of conducting any lawful business or occupation [" except for dealing in real estate or banking," OHIO] within the United States or elsewhere [" this State or elsewhere," VIRGINIA], whose principal office or place of business shall be established and maintained within this State, by subscribing and contributing capital thereto [NEW JERSEY

inserts here "either in money or in real or personal estate, mines, or other property, at a valuation to be approved by all the members subscribing to the capital of such association"], which capital shall alone be liable for the debts of such association, it shall and may be lawful for such persons to sign and acknowledge before some officer competent to take the acknowledgment of deeds a statement in writing in which shall be set forth the full names ["proper names," VIRGINIA] of such persons and the amount of capital of said association subscribed for by each [NEW JERSEY inserts here "the character of the subscription, and if in property other than cash, the description and valuation of said property"]; the total amount of capital and when and how to be paid [OHIO inserts here "which shall be paid as follows, — one third within thirty days of the filing of their statement with the county recorder as hereinafter provided, and two thirds within twelve months thereafter"]; the character of the business to be conducted and the location of the same; the name of the association, with the word 'limited' added thereto as part of the same; the contemplated duration of said association, which shall not in any case exceed twenty years; and the names of the officers of said association, selected in conformity with the provisions of this act. [MICHIGAN inserts here, "contributions to the capital stock may be made in real or personal estate at a valuation to be approved by all the members subscribing to the capital of such association; but where property has been contributed as part of the capital, a schedule containing all the names of the parties so contributing, with a description and valuation of the property so contributed, shall be inserted in such statement."] And any amendment of said statement shall be made only in like manner: which said statement and amendments shall be recorded in the office of the [N. J. "clerk or"] recorder of deeds of the proper county." [MICHIGAN, "register of deeds where such association has its principal office." VIRGINIA, "in the deed-book

of the county or corporation where said principal office is established, and in such statement each partner shall agree to waive the benefit of the homestead exemption as to any debt which he may at any time owe said association. And said statement shall be published once a week for two weeks in some newspaper in the county, city, or town in which the principal office of said association is established." OHIO adds, "and such association shall keep a register of debts and liabilities, in which shall be entered the nature and amount of all debts and liabilities contracted by such association, with the date thereof, together with any payments or credits thereon, which register of debts and liabilities shall be made not to exceed ten days after said debt or liability was contracted, which register shall be open to the inspection of all persons interested in any manner in the business or financial standing of such association during all business hours; and in case such association shall fail or neglect to cause to be entered on such register, within ten days, any debt or liability after the same has been contracted, or shall make or suffer to be made any false entry thereon, the members of such association shall be individually responsible for the debts and liabilities contracted during said neglect or failure to those damnified by such neglect or failure."]

In the Philadelphia Common Pleas in 1878 it was held that where the contributions of the partners were not certified according to the fact, execution would be awarded against them personally. *Bement* v. *Philadelphia Impact Brick Machine Co., Limited*, 12 Phila. 494 ; s. c. 5 Weekly Notes, 58 ; but in the following case this ruling seems to be modified: —

Where a general partnership was formed in February, 1874, and after engaging in business became a limited partnership association in September, 1874, as the Keystone Boot & Shoe Company, Limited, and the certificate stated that the capital was $40,000 paid in cash, whereas the property and assets of the prior partnership were treated as cash and no subscription list was kept, the

court below ruled that the Acts of 1874 provided for a cash capital, and as no statement and valuation of the property was recorded, it is not within the curative Act of May 1, 1876 (see § 210 below), and that no analogy to a limited partnership proper holds, for that statute says that any false statement shall make the parties general partners, while here a false assertion in the statement makes the partners liable in damages, and that as the plaintiff contracted with the association as such, it had as to him a *de facto* existence, and he could not impeach its existence in analogy to the estoppel applied to one who deals with a corporation. But the Supreme Court affirmed all these points except the last, which it reversed, holding that the association was a partnership and not a corporation, and that the plaintiff could attack the validity of the organization in an action against its members, and that the defects pointed out were fatal. *Eliot* v. *Himrod* (Supreme Ct. Pa. 1885), 16 Weekly Notes, 189, reversing s. c. 15 *Ib.* 77.

In an action against the same partnership the Supreme Court of Pennsylvania, in 1881, had held that each subscriber was liable individually to pay the full amount of his subscription, the contribution of goods not being a satisfaction thereof. *Keystone Boot & Shoe Co., Limited*, v. *Schoellkopf's Sons*, 11 Weekly Notes (Pa.), 132.

Any inconsistency in the above cases would be settled by the following; but the report fails to show the nature of the debt. The Supreme Court of Pennsylvania hold that the requirements of the Act of June 1, 1874, must be strictly complied with to free individual members from liability beyond their subscriptions. Here the full names had not been given; the subscriptions did not correspond with the amount stated; it was not stated when or how the subscriptions were to be made, nor their condition; nor was the location of the business specified. *Pears* v. *Barnes* (Supreme Ct. Pa. 1885), 1 Atl. Rep. 658.

A limited partnership association was said to be a *quasi* corporation in *Patterson* v. *Tidewater Pipe Co., Limited*, 12 Weekly Notes (Pa.), 452 (but compare *Lennig* v. *Penn Morocco Co., Limited*, 16 *Ib.* 114); it is an artificial person, and is covered by a statute imposing a penalty on any "person or corporation that mines coal on another's land." In this case the manager committed the trespass, and the association was held subject to the penalty. *Oak Ridge Coal Co., Limited*, v. *Rogers*, 16 Weekly Notes (Pa.), 355.

Property in lieu of cash was certified as follows: A "contract

with the Pennsylvania Gaslight Co. at a valuation of $2,500," and "furniture, fixtures, and all the goods, tools, and chattels now on the premises, 209 L Ave., valuation $12,500." Held, "the description is too general to enable any one to form a correct estimate of the extent of the property, and a lumping valuation is equally difficult to judge of values. . . . It follows that the order of the court below, allowing executions to go out against the individual members for the amount of unpaid stock subscribed by them, was free from error." *Maloney* v. *Bruce*, 94 Pa. St. 249.

§ 210. — Property Capital in Ohio and Pennsylvania.

OHIO, § 3161 *j;* PA., Act of May 1, 1876; Purdon, An. for 1873–8, § 3.

"It shall and may be lawful for any persons [PENNSYLVANIA, "person"] desiring to form a partnership association under this act [PENNSYLVANIA, "the act to which this is a supplement"] to make contribution to the capital thereof in real or personal estate, mines, or other property, at a valuation to be approved by all the members subscribing to the capital of such association [OHIO inserts "provided that one half the capital of said partnership association shall be paid in cash"]; provided that in the statement required to be recorded by the first section of this [PENNSYLVANIA, "the said"] act, subscriptions to the capital, whether in cash or [PENNSYLVANIA, "in"] property, shall be certified in this respect according to the fact; and when property has been contributed as a part of the capital, a schedule containing the names of the parties so contributing, with a description and valuation of the property so contributed, shall be inserted."

OHIO, § 3161 *k;* PA., Act of May 1, 1876; Purdon, p. 2028, § 4.

"All contributions to the capital of such associations [PENNSYLVANIA, "heretofore"] organized under this act [PENNSYLVANIA, "the act to which this is a supplement"], in real or personal estate, mines, or other property, at a valuation agreed

upon by all the members subscribing to such capital, shall be as complete and effectual as if the same had been made in cash; provided a certificate of the same shall be recorded as required in the first section of this act."

For MICHIGAN and NEW JERSEY, see § 209, *supra*.

Where the purpose of a limited partnership association was to refine oil, it was held (Com. Pl. Pa. 1882) that it could hold such real and personal property as was necessary for that purpose, and that the managers could buy the stock of an oil-refining company, by control of which the business of refining was to be carried on. And if the members were not satisfied with the business policy of the managers, their remedy was to elect new ones, and not to apply for a receiver; and that a stockholder might be estopped by acquiescence from complaining, *Patterson* v. *Tidewater Pipe Co., Limited*, 12 Weekly Notes, 452.

§ 211. Liability. — Books, and compelling their Production.

MICH. § 2366; N. J. § 2; OHIO, § 3161 *b*; PA. § 2; VA. 2.

"The members of any such partnership association shall not be liable under any judgment, decree, or order which shall be obtained against such association, or for any debt or engagement of such company, further or otherwise than is hereinafter provided; that is to say, if any execution [PENNSYLVANIA inserts here "sequestration"] or other process in the nature of execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereof to buy or enforce such execution [PENNSYLVANIA adds "sequestration"] or other process, then such execution [PENNSYLVANIA adds "sequestration"] or other process may be issued against any of the [OHIO, "its"] members to the extent of the portions of their subscriptions respectively in the capital of the association not then paid up; *provided always* [NEW JERSEY omits this entire proviso] that no such execution shall issue against any member except

upon an order of court or of a judge of the court [VIRGINIA omits "or of a judge of the court"] in which the action, suit, or other proceeding shall have been brought or instituted; and the said court or judge may compel the production of the books of the association showing the names of the members thereof and the amount of capital remaining to be paid upon their respective subscriptions, and from them or other sources of information ascertain the truth in regard thereto, and may order execution to issue accordingly; and the said association shall be and it is hereby required to keep a subscription-list book for that purpose, and the same shall be open to inspection by the creditors and members of the association at all reasonable times." [MICHIGAN adds, "Provided that nothing herein contained shall be construed to exempt the members of such partnership association from individual liability for all labor performed for the association."]

§ 212. Name. — Sign. — Liability for omitting "Limited."

MICH. § 2367; N. J. § 3; OHIO, § 3161 *c;* PA. § 3; VA. § 3.

"The word 'limited' shall be the last word of the name of every partnership association formed under the provisions of this act; and every such association shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the association is carried on, in a conspicuous position, in letters easily legible, and shall have its full name mentioned in all notices, advertisements, and other official publications of such association, and in all bills of exchange, promissory notes, checks, orders for money, bills of lading, invoices, receipts, letters, or other writings used in the transaction of the business of the partnership association; provided that the omission of the word 'limited' in the use of the name of the partnership association shall render each and every person participant in such omission, or knowingly acqui-

escing therein, liable for any indebtedness, damage [Ohio, "damages"], or liabilities arising therefrom."

Where W, as chairman, drew a draft on M, the treasurer of a limited partnership association, which M accepted, and W and M on being sued personally upon, claimed in defence that they had acted as officers, it was held that the omission of the word "limited" made them liable, *German* v. *Moodie*, 9 Weekly Notes (Pa.), 221; *Penrose* v. *Martyr*, E. B. & E. 499.

§ 213. **Shares. — Their Transfer.**

Mich. § 2368, and original Pa. § 4; N. J. § 4; Ohio, § 3161 *d*; Va. § 4.

"Interest (interests) in said association shall be personal estate, and may be transferred under such rules and regulations as the association may prescribe [Ohio here inserts, "and such transfer shall take effect when the same is delivered for record, including the name of the parties thereto and the amount of the interest so transferred, in the office of the county recorder; and such recorder shall enter the same, for which he shall receive the same fees as in other cases"]; but no transferee of any interest or the representatives of any decedent or of any insolvent [Virginia, "or bankrupt"] shall be entitled thereafter to any participation in the subsequent business of said association, unless he or she be elected thereto by a vote of a majority of the members in number and value of their interests; and any change of ownership, whether by sale, death, bankruptcy, or otherwise, which shall not be followed by election to the association, shall entitle the owner only to his interest in the association, at a price and upon terms to be mutually agreed upon; and in default of such agreement the price and terms shall be fixed by an appraiser appointed by the court of common pleas of the proper county [Michigan, "circuit court of the county where the association has its principal office"], subject to the approval of said court." [Virginia substitutes for

last three lines, "by an appraiser or appraisers agreed on by the parties or appointed in term or vacation by judge of the circuit or corporation court of the county, city, or town in which the principal office of such association is located; provided that notice be given of the application for such appointment to the association or party interested at least five days before the same is heard."] [MICHIGAN adds: "Provided that it may be stipulated and agreed in the statement in writing by which said association is organized, or by amendment filed thereafter, that on the death of any member his interest, if the representatives of his estate so elect, shall continue in the association during the continuance thereof, and that the representatives of his estate may select some person to whom his interest may be assigned, in trust or otherwise, who shall thereupon become a member of such association in place of such deceased member, with all his rights, privileges, and responsibilities."]

PA. § 4, as amended, Act of June 25, 1885, Am. Laws of 1885, p. 182.

"Interests in such partnership associations shall be personal estate, and may be transferred, given, bequeathed, distributed, sold, or assigned under such rules and regulations as such partnership associations shall from time to time prescribe by a vote of a majority of the members in number and value of their interests; and in the absence of such rules and regulations, the transferee of any interest in any such association shall not be entitled to any participation in the subsequent business of such association unless elected to membership therein by a vote of a majority of the members in number and value of their interests. And any change of ownership, whether by sale, death, bankruptcy, or otherwise, which occurs in the absence of any rules and regulations of such associations regulating such transfer, and which is not followed by election to membership in such associations, shall entitle the owner or transferee only to

the value of the interest so acquired at the date of acquiring such interest, at a price and upon terms to be mutually agreed upon; and in default of such agreement at a price and upon terms to be fixed by an appraiser to be appointed by the court of common pleas of the proper county on the petition of either party, which appraisement shall be subject to the approval of said court."

On the death of a member the association did not elect his representative to a participation in subsequent business, and the association filed a petition to have the value of the decedent's share ascertained. The court appointed an appraiser, who reported that testimony of the value of the share based on the assumption of a right to future profits was not a guide, as there was no right to future profits; that the usual rule for ascertaining interest in a general partnership is the same for a limited partnership association, the act merely changing the machinery for its ascertainment by not requiring a ruinous action for an account, and that rule was a proportion of the value of the assets after paying all debts; that the right to use the partnership name upon its goods was an exceedingly valuable asset, being a good will, but as it depends on the continuance of the association, and as no value was placed upon it, this item must be excluded; the association is in the position of surviving partners buying the interest of a deceased partner; that profits made between the date of the death and the taking of the account must be considered and without allowance to the surviving partners for continuing the business, and interest on the capital remaining in since the date of the account. This report was confirmed by the court, no exceptions having been taken, In re *Disston & Sons' File Co., Limited*, 8 Weekly Notes (Pa.), 58.

The sale by a member of his interest to another passes title on delivery of the certificate and power of attorney to transfer without regard to a rule of the association that stock is transferable only on the books and in a particular manner, and a levy on his shares by a judgment creditor after such assignment, but before transfer on the books, takes nothing against the assignee. Such rule of the company is for the protection of shareholders only, and does not affect third parties, *Tidewater Pipe Co., Limited*, v. *Kitchenman* (Supreme Ct. Pa. 1885), 16 Weekly Notes (Pa.), 101.

§ 214. Meetings. — Officers. — Election. — Contracting Debts.

MICH. § 2369; N. J. § 5; OHIO, § 3161 *e;* PA. § 5, as amended Laws of 1879, p. 124; VA. § 5.

"There shall be at least one meeting of the association in each year [MICHIGAN here inserts, "notice of which shall be served on each member of the association ten days prior to said meeting"], at one of which there shall be elected not less than three nor more than five managers of said association, one of whom shall be the chairman [VIRGINIA, "president"], one the treasurer, and one the secretary, or one may be both treasurer and secretary [MICHIGAN omits "or one may be both treasurer and secretary;" PENNSYLVANIA, Am. Laws of 1879, p. 124, amends above so as to read thus after the word "elected": "not less than three nor more than seven managers of said association, who shall choose one of their number as chairman; the other officers shall be a treasurer, a secretary, and such other officers as may be deemed necessary, and the same person may be both treasurer and secretary"], who shall hold their respective offices for one year and until their successors are duly installed; and no debt shall be contracted or liability incurred for said association except by one or more of said managers, and no liability for an amount exceeding five hundred [VIRGINIA, "two hundred"] dollars, except against the person incurring it, shall bind the said association, unless reduced to writing and signed by at least two managers." [MICHIGAN adds, "except in case of associations for the purpose of buying and selling merchandise, a majority of the interest may select one of the managers each year to purchase merchandise required in the business of the association, make contracts, and sign notes for the same: *provided* such power be given in writing fully setting forth the extent to which such manager may make purchases and contract debts for the association, which shall be signed by a majority of

the members in number and value of their interest; and such power of purchasing and contracting debts shall be strictly limited to the ordinary business of the association: *and also provided* that at the time of the formation of such association, rules not inconsistent with the provisions of this act may be adopted for the management thereof, which shall only be amended by the consent in writing of three fourths in number and value."]

Where a by-law provided that if the manager failed to appoint tellers of an election the stockholders should elect them, and the chairman, against the protest of the stockholders, appointed the tellers, it was held that the managers elected at such election had no title, and would be enjoined from interfering in the business of the association, *Tidewater Pipe Co., Limited,* v. *Satterfield,* 12 Weekly Notes (Pa.), 457.

A partnership association limited is simply an association of partners with limited liability, and not a corporation; therefore a note by the chairman partner with power of attorney to confess judgment has the same validity as a confession of judgment by a single partner in a general partnership, and judgment thereon will not be set aside, *Lennig* v. *Penn Morocco Co., Limited,* 16 Weekly Notes (Pa.), 114. But the manager cannot bind the association by giving a judgment note in favor of himself and others, *Dennlinger* v. *Monitor Oil Co.,* 28 Pitts. L. J. 212.

An association for mining coal is liable for statutory damages imposed on any "person or corporation" for a trespass by its manager in mining on the lands of plaintiff (Supreme Ct. of Pa. 1884), *Oak Ridge Coal Co., Limited,* v. *Rogers,* 16 Weekly Notes, 355.

§ 215. Profits.

MICH. § 2370; N. J. § 6; OHIO, § 3161*f*; PA. § 6; VA. § 6.

"The association may from time to time divide the profits of its business in such manner and in such an amount as a majority of its managers may determine, which profits [VIRGINIA "dividends"] so divided shall not at any time diminish or impair the capital of said association; and any one consenting to

a dividend which shall diminish or impair the capital shall be liable to any person or persons interested or injured thereby to the amount of such diminution or impairment."

An association having $28,000 undivided profits in its treasury resolved to divide them, and accordingly gave M, one of the partners, its note for $7,000, being his share, with an agreement by him to repay it in thirty-four days. Held, the agreement to repay cannot be enforced. The company by its resolution had determined the ownership of the money. If the agreement to refund was based on a consideration, it should have appeared; it was either void or depended on a consideration that never occurred. The master had held that if the agreement to repay was one to contribute $7,000 to the capital, it was void, as the articles would have to be amended (Supreme Ct. Pa. 1886), *Appeal of Liggett Spring & Axle Co., Limited*, 2 Atl. Rep. 684.

§ 216. Lending Credit or Capital.

MICH. § 2371; N. J. § 7; OHIO, § 3161, *g*; PA. § 7; VA. § 7.

"It shall not be lawful for such association to loan its credit, its name, or its capital to any member of said association, and for such loan to any other person or association the consent in writing of a majority in number and value of interest shall be requisite." [MICHIGAN adds "and in no case shall the credit of the association be loaned, except the regular business of the association is to be directly benefited thereby." OHIO has it thus: "§ 3161 *g*. It shall not be lawful for said association to loan its credit, its name, or its capital to any person or corporation whatever."]

A defence that the note sued on was not made and delivered in the course of business of the association, but was delivered by one of the members without the consent of the co-members for the purpose of loaning the credit of the company to the payee, would state a good defence against the payee, and as against an indorsee puts upon him the burden of showing a purchase for value before maturity and without notice (Supreme Ct. Pa. 1885), *Lerch Hard-*

ware Co., Limited, v. *First National Bank*, 16 Weekly Notes (Pa.), 104.

If such association issues a note to a member as a loan of its credit, and subsequently pays the note to an indorsee of it, it cannot recover the amount from the payee, being an unlawful obligation. Per GORDON, J. (Supreme Ct. Pa. 1886), *Appeal of Liggett Spring & Axle Co., Limited*, 2 Atl. Rep. 684, 687.

§ 217. Real Estate, and how Conveyed.

N. J. § 9; the first half of OHIO, § 3161 *l*; of MICH. § 2374; and of PA., Act of May 1, 1876, Purdon, p. 2028, § 5.

"That all real estate owned or purchased by any association created under and by virtue of this act shall be held and owned, and conveyance thereof shall be made, in the association name."

NEW JERSEY, Laws of 1883, p. 188; Act of March 23, 1883.

"§ 1. That any partnership association formed or to be formed under the act to which this is a supplement shall have power to purchase and hold real estate and dispose of the same in fee-simple or for a less estate, the title thereof to be in the name adopted by such association, and shall be as valid and effectual in law or equity as if the same were held in the individual names of the partners of said association; and every deed or conveyance of the same and every mortgage for purchase or borrowed moneys, shall be made in the name adopted by said association, and executed in the same manner as set forth in section 10 of the act to which this is a supplement."

"§ 2. That any association heretofore formed under the act to which this is a supplement now holding any real estate in their association name, either by purchase or subscription, the title thereof shall be as good and effectual in law or equity as if the same were acquired after the passage of this act."

§ 218. — Conveyances in New Jersey, Ohio, and Pennsylvania.

N. J. § 10 ; Ohio, § 3161 *m;* Pa., Act of Feb. 18, 1875, 3 Purdon, 1028, § 1.

"That whenever any association formed under this act [New Jersey and Pennsylvania, "the act to which this is a supplement:" clearly an error in New Jersey, for it is not a supplement] shall have occasion to execute any deed of conveyance or bonds with or without coupons and mortgages to secure purchase or borrowed moneys, such association shall have a right to [New Jersey and Pennsylvania, "adopt and use a common seal and to"] acknowledge such instrument by their chairman and secretary."

[Pennsylvania adds this section: "The provisions of the foregoing section shall be regarded as applicable to and authorizing the execution of deeds, bonds, and mortgages heretofore made and delivered by any association formed under the act to which this is a supplement."]

§ 219. Actions. — Service of Process.

N. J. § 9, and the last half of Mich. § 2374, of Ohio, § 3161 *l*, and of Pa., Act of May 1, 1876, 3 Purdon, 2028, § 5.

"Said association shall sue and be sued in their association name, and when suit is brought against any such association, service thereof shall be made upon the chairman, secretary, or treasurer thereof, which service shall be as complete and effective as if made upon each and every member of such association."

Pa., Act of June 10, 1881, Laws of 1881, p. 115.

"Any partnership association organized under the said act, and the several supplements thereto, may, in addition to the methods already authorized, be served with legal process in

any county of this Commonwealth where said association shall maintain and keep an office for the transaction of business by serving such process upon any agent, chief, or any other clerk, or upon any director or manager of such association; and such service shall be good and valid in law to all intents and purposes as service upon such association."

Directors of a limited partnership association are entitled to costs as witnesses for attending the trial of a cause to which the association is a party. The two managers are not entitled to witness-fees. *Sharpless* v. *Pikeland Creamery, Limited*, 1 Pa. County Ct. Reports, 42.

An action on a note signed with the name of a limited partnership association was brought against the individual partners trading as "G. G. & Co., Limited." The court ordered the record to be amended by striking out the individual names. *Ladner* v. *Gibbon*, 5 Weekly Notes (Pa.), 127.

In an action by a creditor against the members individually, to which they plead a limited liability, the creditor may show a fatal defect in organizing the association, and may recover judgment against them (Supreme Ct. Pa. 1885), *Eliot* v. *Himrod*, 16 Weekly Notes (Pa.), 189.

§ 220. Dissolution.

MICH. § 2372; N. J. § 8; OHIO, § 3161 *h*; PA. § 8; VA. § 8.

"Such association may be dissolved, —

"1. Whenever the period fixed for the duration of the association expires.

"2. Whenever by a vote of a majority in number and value of interest [OHIO, "in value of interest and number"] it shall be so determined, and notice of such winding up shall be given by publication in two newspapers [VIRGINIA, "if so many be published in the county, city, or town where its principal office is located"] published in the proper city or county at least six consecutive times [MICHIGAN, "at least four consecutive weeks"]; and immediately upon the commencement of said advertising said association shall cease to carry on its business,

except so far as may be required for the beneficial winding up thereof."

As a general rule the creditors of an insolvent limited association cannot on that account have trustees appointed. All the stockholders but one being dead, and he taking no steps to wind up the concern, it was held that the only protection there was for a creditor was a receiver, which would therefore be granted, and for the additional reason that creditors not having judgments could not test the justice of a judgment obtained by another creditor. *Hilborn v. Covenant Publishing Co., Limited,* 12 Weekly Notes (Pa.), 548.

§ 221. **Wind up. — Distribution.**

MICH. § 2373; OHIO, § 3161 *i;* PA. § 9; VA. 9.

"Whenever any such partnership association shall be dissolved by the voluntary action thereof, its property shall be applied and distributed as follows: —

"1. To the payment of all debts for wages of labor. [OHIO has it: "To the payment of all debts for work and labor, and to secure which in case the said property is insufficient, the separate estate of each partner shall be liable without limitation or exemption, except as provided by law."]

"2. To the satisfaction of its other liabilities and indebtedness. [VIRGINIA adds "*pro rata.*"]

"3. After payment thereof the same shall be distributed to and among the members thereof in proportion to their respective interests in the following manner: —

"4. Three liquidating trustees shall be elected by the members of the association, who shall have full power and authority to wind up the concern and distribute the net assets thereof among the members, under the direction of the court of common pleas [MICHIGAN, "circuit court"] of the proper county." [VIRGINIA adds here: "said trustees to state and settle their accounts from time to time as is now required by law of other trustees."]

For MICHIGAN, see end of § 211.

§ 222. No Retroactive Legislation.

MICH. § 2375; PA. § 10; VA. § 10.

"No amendment, modification, or repeal of this act shall affect anything duly done, right acquired, liability incurred, or penalty, forfeiture, or other punishment incurred, or to be incurred, in respect of any offence against the provisions of this act before such amendment, modification, or repeal comes into operation."

APPENDIX OF FORMS.

Certificate (p. 34 above).

A. B., G. H., L. M. and *X. Y.* desire to form a limited partnership, and certify as follows: —

1. The name under which the partnership is to be conducted is *B. & H.*

2. The general nature of the business to be transacted is a boot and shoe manufacturing establishment in the city of ——.

3. The names of all the partners and their respective ["usual" in UPPER CANADA] places of residence are as follows: The general partners are *A. B.*, residing at No. —, —— street, in the city of ——, and *G. H.*, residing at ——. The special partners are *L. M.*, residing at ——, and *X. Y.*, residing at ——.

4. The special partners have contributed the following capital in cash: *L. M.* $ ——, and *X. Y.* $ ——.

5. The partnership is to commence on the —— day of ——, 188– [this date must be subsequent to the record of the certificate], and is to terminate on the —— day of —— 189–.

(Signed) *A. B.*
G. H.
L. M.
X. Y.

[*Acknowledgment* before notary, etc., see p. 36 above.]

ILLINOIS. — Some forms are given in the report in *Henkel* v. *Heyman*, 91 Ill. 96.

CAUTION. — It is not safe to date or execute this certificate before all the special capital is in the hands of the general partner. If it

is paid by check, see that the check is collected by him, or if in the same bank as his deposit, that it is credited on his account (*supra*, pp. 58–59). Pennsylvania courts do not require such strictness, and a dictum in *Lineweaver* v. *Slagle*, 2 Atl. Rep. 693 (Md. 1886), reported too late for insertion in the body of this work, coincides with the Pennsylvania rulings. Furthermore, let each special partner see that other special partners have put in their capital (*supra*, p. 61, § 49).

UPPER CANADA. — (Form of certificate appended to the act 12 Vic. 75, *supra*, p. 35).

We, the undersigned, do hereby certify that we have entered into co-partnership under the style or firm of (*B. D. & Co.*) as (*Grocers and Commission Merchants*), which firm consists of (*A. B.*), residing usually at ——, and (*C. D.*), residing usually at ——, as general partners, and (*E. F.*), residing usually at ——, and (*G. H.*), residing usually at ——, as special partners. The said (*E. F.*) having contributed (£1,000), and the said (*G. H.*) (£2,000) to the capital stock of the said partnership. Which said co-partnership commences on the —— day of —— (*Anno Domini one thousand eight hundred and forty-nine*), and terminates on the —— day of —— (*Anno Domini one thousand eight hundred and fifty-two*). Dated this —— day of —— (*Anno Domini one thousand eight hundred and forty-eight*).

(Signed) *A. B.*
C. D.
E. F.
G. H.

Signed in presence of me, *L. M.*,
Notary Public.

Affidavit (p. 37 above).

State of —— }
County of —— } SC.

A. B., being duly sworn, says he is one of the general partners of the limited partnership of *B. & H.*, named in the above certificate, and that the sums specified in the certificate, viz.,

$ —— contributed to the common stock by the special partner *L. M.*, and $ —— contributed to the common stock by the special partner *X. Y.*, have been actually and in good faith paid in cash. (Signed) *A. B.*

[*Verification.*]

By consulting pages 37 and 38 above, it will be seen that certain States require each partner to make the affidavit; that COLORADO requires the special partner to make it; that MISSISSIPPI requires it to state that no part is in stocks, credits, or any kind of security; and that many States do not require any affidavit, and two require a verification to the certificate. UPPER CANADA also requires the certificate to be verified (p. 35).

Publication (p. 39 above).

A. B., residing at ——, and *G. H.*, residing at ——, as general partners, and *L. M.*, residing at ——, and *X. Y.*, residing at ——, as special partners, did on the —— day of —— form a limited partnership, under the laws of the State of ——, for the purpose of conducting the business of boot and shoe manufacturing in the city of ——. The firm-name is *B. & H.* The special partners have contributed as capital as follows: *L. M.* $ ——, and *X. Y.* $ ——. The partnership commenced on the —— day of ——, and will terminate on the —— day of ——.

The publication may generally be of the terms of the certificate verbatim, changing the future tenses to past tenses. I suggest the above form merely as less expensive to publish, being more condensed than the certificate.

By consulting page 40 above, it will be seen that three States require the publication to be of a copy of the certificate. PENNSYLVANIA, by statute § 10, requires the publication to consist of "I. The name of the firm under which such partnership shall be conducted. II. The general nature of the business intended to be transacted. III. The names of the general partners and their respective places of residence. IV. The aggregate amount of capital contributed by the special partners to the common stock. V. The period at which the partnership is to commence, and the period at which it will terminate."

Proof of Publication (p. 40 above).

State of —— }
County of —— } sc.

R. S., being duly sworn, says he is [printer] of the ——, a newspaper published in the city of ——, and that the notice hereto appended of the terms of the limited partnership of *B. & G.* was published for —— consecutive weeks on the same day of the week; the first insertion being on the —— day of ——.

(Signed) *R. S.*

[*Verification.*]

Renewal. — In view of the latest decision on this subject (*supra*, pp. 151–152), I do not feel willing to undertake the responsibility of drafting a form except for my own clients.

Publication of Dissolution (p. 153 above).

The limited partnership of *B.* and *C.*, composed of *A. B.* and *G. H.* as general, and *L. M.* and *X. Y.* as special partners, is dissolved by mutual consent on and after the —— day of ——. [Put this date after the end of the time of publication, p. 162.]

(Signed) *A. B.*
G. H.
L. M.
X. Y.

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